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## REPORTS OF CASES

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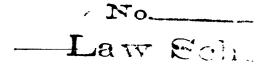
IN LAW AND EQUITY, ARGUED AND DETERMINED IN THE

# SUPREME COURT OF GEORGIA,

AT ATLANTA.

Part of September Term, 1881,

February Term, 1882.



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By J. H. LUMPKIN, REPORTER.

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OF THE

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#### NOTE.

By the Act of 1866 (section 4270 of the Code), the decisions of the Supreme Court are required to be announced by written synopses of the points decided. The decisions thus announced are published as the opinions of the Justices delivering them, the head-notes being made by the reporter.

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## CASES ARGUED AND DETERMINED

IN THE

# Suppeme Court of Georgia,

#### AT ATLANTA.

#### SEPTEMBER TERM, 1881.

PRESENT—JAMES JACKSON. . . . . CHIEF JUSTICE.

MARTIN J. CRAWFORD. . . ASSOCIATE "

ALEXANDER M. SPEER. . . " "

#### GORDON VS. MITCHELL.

(On motion to dismiss)

- I. Agreed copies of certain court papers were used in evidence on the trial of a case, and on the motion for new trial were attached to the brief of evidence, with the agreement that they be used on the motion for new trial, and if the case should be carried to the supreme court that they should be copied in the record as part thereof, in all respects as though they had been copied out into the brief of evidence, and the brief so formed was examined, approved and filed in office. On exception to the overruling of the motion for new trial the bill of exceptions recited that "a brief of the testimony introduced on the trial has been filed under the revision and approval of the court, and is a part of the record of the cause, identified by the signature of the judge appended to the agreement of counsel to said brief of evidence:"
- Held, that the brief of evidence was fully authenticated, and the case will not be dismissed.
- 2. That the agreement of counsel to a brief of evidence recites that it consists of a certain number of pages, and when the same is copied by the clerk, it covers in the record more than that number of pages, is no cause for dismissal.

(On the merits.)

v 68-2

- I. That a vendor had no personal knowledge of the items of account on which he sued at the time when they were made, was no ground for the exclusion of his testimony, where it appeared that after the goods were furnished he and the defendant went over the account together and agreed to its correctness.
- 2. The verdict is upheld by the evidence.
- A contract to sublet, sublease or hire out convicts leased from the state, is illegal.
- (a.) A contract for one as an agent of a lessee of convicts to work them according to law on the place of the lessee would be legal, but for a lessee to turn over convicts to another to be carried away and worked by him for his own use at another place, would be illegal.
- (b.) If upon the dissolution of a firm one partner, who was a lessee of convicts, put certain of them in charge of the other partner, by whom a contract was made with a creditor of the firm to let him have the labor of such convicts for eight years in payment of the firm debt, and the partner who was a lessee shortly thereafter resumed control and took the convicts from the creditor, such facts would not constitute accord and satisfaction of the firm debt.
- Requests to charge not based on the testimony were properly refused.
- 5. The judge of the superior court may grant a new trial on terms; or may propose terms, and on their refusal in advance by counsel, may refuse a new trial. Such practice will not work a reversal of his judgment.

Practice in Supreme Court Evidence. Verdict. Contracts. Charge of Court. New Trial. Practice in Superior Court. Before Judge HILLYER. Dekalb Superior Court. March Term, 1881.

Reported in the decision.

VAN EPPS & CALHOUN, for plaintiff in error.

CANDLER & THOMSON, for defendant.

JACKSON, Chief Justice.

(On motion to dismiss writ of error.)

A motion was made to dismiss this case on the ground that the evidence in the record—particularly the documentary part thereof, is not authenticated in the bill of

exceptions and record, so as to show that it is that which the superior court had before it on the trial before the jury and on the motion for a new trial.

The bill of exceptions recites that "a brief of the testimony introduced on the trial has been filed under the revision and approval of the court, and is a part of the record of the cause identified by the signature of the judge appended to the agreement of counsel to said brief of evidence."

In the record is the following agreement:

"It is hereby agreed that the above and foregoing one hundred and eleven pages, including the charge of the court, contains a true copy of all the documentary and a brief of all the oral evidence adduced on the trial of the above stated case, and it is further agreed that the agreed copy of the bill, exhibits, and order and other writings hereto attached, used on the trial of this case may be used on the hearing of this motion for new trial, and that the same in the event that this case is carried to the supreme court by either party, may be copied into the record by the clerk and become a part of the record in this case, in all respects as if the same had been copied in the above agreed and approved brief of evidence. This the fourth day of April, 188—."

This was agreed to by counsel, and examined, and approved, and ordered filed by the judge on the 4th of April, 1881, and on that day filed in office by the clerk.

So that in the bill of exceptions, which the judge certifies to be true, it is alleged that the brief of evidence has been filed under his approval, and is identified there by his signature to the agreement; and in the record there it is identified just as the bill of exceptions says that it is; and thus the one hundred and eleven pages contain the evidence, oral and written, used on the trial, and all this the clerk has copied and sent up as part of the record pursuant to the order. Therefore, it is clear that we have here authenticated by the judge, all the evidence he had before the jury on the trial, and before himself on the motion.

It does not matter that it took more than one hundred and eleven pages by the clerk in copying.

Those one hundred and eleven pages were filed, and he

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copied them. The evidence, therefore is sufficiently identified by the judge.

This case differs from 61 Ga., 337, in this, that the evidence is expressly approved here by the court in the record, as well as referred to in the bill of exceptions.

It differs from 64 Ga., 668 in this, that from the agreement here it appears that copies, and not original office papers, such as interrogatories, indictments and warrants as in that case, nor any original paper of any sort, were used on the motion in this case; also, that the one hundred and eleven pages ordered to be filed contained the copies which were filed, and are sent up here as a part of the record.

The duty of the clerk is to copy that which the judge orders of file as the evidence on the trial; and this he has done. All the oral evidence comes here copied by the clerk as of file in his office; why not the documentary, if ordered to be filed there, as part of the record?

Therefore, we think that all this evidence is referred to in the bill of exceptions, and also authenticated by the judge in the record, and is that which was used on the jury trial and on the motion before him, and is certified by him as so used.

Motion to dismiss denied.

CRAWFORD, Justice.

(On merits of case.)

In April, 1880, John D. Mitchell brought suit against Cox & Gordon in the superior court of Dekalb county on an open account, to which the defendant, Gordon, pleaded the general issue and accord and satisfaction. The defendant, Cox, filed no pleas. The plea of accord and satisfaction filed by the defendant, Gordon, was based upon the fact of a dissolution of the partnership, and in which it was agreed between them that the liabilities of the concern were to be paid by Cox, and that Cox afterwards entered

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into certain contracts with the plaintiff, Mitchell, by which, in connection with the acts of Mitchell, he, Gordon, was discharged.

The jury on the trial of the issues returned a verdict for Mitchell, for the sum of \$1,700.00 besides interest, and the defendant, Gordop, moved for a new trial, which was refused, and that refusal is alleged to be error.

The questions at issue between these parties on the motion for a new trial involve matters of fact as well as matters of law. It is insisted that the testimony does not authorize the verdict, and this makes it necessary for this court to examine the same, to see whether it is sufficient to warrant the jury in their finding. The record shows that the indebtedness set up was incurred wholly by the defendant, Cox, and that the defendant, Gordon, had no personal knowledge of the items charged, and therefore could give no sufficient testimony to rebut the positive testimony of the plaintiff, and thereby reduce the amount claimed.

The testimony of the plaintiff was that the items as set out in the bill of particulars, with the prices annexed thereto, were correct. That the delivery of the corn was made by his agent, McDowell, and that afterwards Cox and plaintiff got together and agreed that it was correct; and upon a failure by Cox to get the money to pay cash as he expected, it was agreed that the credit price thereof should be \$1.35 per bushel.

That it was thus testified to several times during the examination, appears from the brief of the evidence; and so of the other items. The questions were varied, but the answers thereto were uniformly the same; that after the delivery of the articles, Cox and the plaintiff would get together, compare their memoranda of them and agree as to what had been received, and that this was done very soon after they were furnished.

There was one item of bacon of 1103 pounds, which was the subject of dispute between the counsel, because the sum

of \$110.30, which was the amount due therefor, was deducted in the amount from the whole amount when it should have been added. This the plaintiff swears was the quantity gotten by the defendants, and never paid for, and of course should have been added.

The testimony of the plaintiff was supported by witness McPherson in that, whilst he was on the plantation of the defendant they got corn from the plaintiff. He further testified that he had charge of the feeding of the stock, and whenever the corn was out he would go to the plaintiff for more, and that they were getting corn there all the time. He also corroborated the plaintiff in the matter of the lumber and the wheelbarrows having been received and used by the defendants, as also to the cotton seed and syrup.

- I. A motion was made to rule out the testimony of the plaintiff, Mitchell, because he did not know all the items to be correct of his own knowledge. This motion was overruled by the court, and this ruling is assigned as a ground of error in the motion for a new trial. Had this testimony stood by itself, the motion would have had merit in it, but when coupled with the further statement that he and the defendant, Cox, had compared the items and had agreed to their correctness, it was immaterial whether he had any personal knowledge thereof or not.
- 2. It is also insisted by counsel for plaintiff in error that if the verdict be correct for any amount, it is still too large by \$200.00. This would be true if the jury believed that the \$110.00 for the meat should be deducted, but being added to the \$2,370.00, it makes the aggregate amount \$2,480.00, and when the \$760.00 is deducted, the balance remaining is \$1,720,00, being \$20.00 more than the verdict. So that there was no mistake if they believed the plaintiff as to the fact that the meat was to be charged instead of credited, as they must have done, or the verdict would have been as claimed by counsel for plaintiff in error.

A thorough examination of this testimony will show that if the jury believed the plaintiff and McPherson, although there was other testimony tending to weaken that of Mitchell, still they had sufficient proof to find their verdict, and enough to hold it as against its being set aside by the judge for the want of evidence to support it.

3. The pleas of accord and satisfaction rested mainly on the two following contracts made between the defendant, Cox, and the plaintiff, Mitchell, the same having been made by them after the dissolution of the partnership of Cox & Gordon. This dissolution provided that Cox, as agent of Gordon, was to take charge of the sixty convicts to be placed on Gordon's plantation and work them, treat them humanely, pay all the expenses, including the hire due the state, and after turning over fifty bales of cotton per annum to Gordon, he was to have what remained of the crops. The agency of Cox was to run for eight years, provided Cox complied with the agreement with Gordon, and the act of the legislature of eighteen hundred and seventy-six providing for the lease of the convicts. It was also further stipulated and agreed that Gordon was in no way to be held liable for the money used in making the crops. Dated August 13th, 1878.

#### "TAYLOR COUNTY, January 25th, 1879.

Contract entered into between J. D. Mitchell and Ed. Cox on the following condition: Ed. Cox, of the first part, agrees to let J. D. Mitchell have twenty convicts for the term of eight years on the following conditions: J. D. Mitchell is to take up a mortgage given by the said Cox to C. B. Howard and T. J. Marshall, amount of the mortgage I do not remember the precise amount, somewhere between seven hundred and forty dollars to seven hundred and sixty dollars; said mortgage due last December; the said mortgage is to be held by Mitchell until the said twenty hands pay the above mentioned mortgage at the rate of thirty dollars each and all expenses, the mortgage then to be turned over to the said Cox in part payment for said hands, for the remainder of the term of eight years they are held in payment by the said J. D Mitchell for an account in full satisfaction of corn account held by J. D. Mitchell against Gordon & Cox. This "account" (contract) is to be in full settlement of account between Cox and Mitchell and Gor-

don. If the lease should be abrogated or forfeited Mr. Mitchell is to receive in proportion "prior" (erasure) number of hands whatever may be gotten from damage from the state as per same rate per hand as I do. (Signed,) ED. Cox,

J. D. MITCHELL."

M. W. SAMS, JR., G. T. McDowell.

"GEORGIA-Fukon County.

This agreement entered into this 29th day of March, 1879, between Edward Cox and J. D. Mitchell, both of the county of Taylor, in said state, witnesseth that the said Cox, in consideration of the said Mitchell's having this day surrendered up for cancellation a deed heretofore made him by said Cox to a house and lot in the town of Decatur, and having fully released and discharged said Cox from the payment of the sum of money mentioned in the deed as seven hundred and fifty dollars, which said deed was executed to secure, and in further consideration of the eventual cancellation and discharge of all indebtedness of Gordon & Cox to said Mitchell, provided the said Mitchell receives the hands as hereinafter provided, has this day sublet to said Mitchell, for the term of eight years from the first of April next, twenty-five out of sixty convicts that have fallen or may fall to said Cox, under his agreement with John B. Gordon, said twenty-five convicts to include the six now held by said Mitchell, the ten at Lathrop's and the four at Marshall's, and such other average hands as may be assigned to said Mitchell, the said Mitchell paying the expenses of getting such hands to his camp. It is understood and agreed that said deed of Cox is surrendered and cancelled, and the indebtedness it was given to secure discharged instanter in any event; but the indebtedness of Gordon & Cox is only to be discharged in proportion as the said Mitchell secures the twenty-five hands for said term provided his failure to secure their services is in no way attributable to any fault of his, and in the event of failure attributable to any fault of said Mitchellthat "indebted" too to be discharged. It is further agreed that should said Mitchell have to pay off a note of Gordon & Cox to Swift & Son for five hundred and fifty dol'ars, then and in that event the mortgage which he held to secure him against liability on said note is not to be It is further agreed that in the event said Lathrop affected hereby. and Marshall should refuse to deliver to the said Mitchell the convicts held by them, and in that event a number sufficient to make up twentyfive average hands shall be turned over to said Mitchell out of the sixty aforesaid that said Cox is entitled to.

And the said Mitchell is bound to pay the lease or lien to the state of said hands, and do all other acts that would be required of said

Cox to entitle him thereto, it being the true intent and meaning of this agreement that said Mitchell takes the place of said Cox as to said twenty-five hands, and releases said Cox from all liability for their care as well as from all personal individual liability by reason of any past contract between said Cox and said Mitchell. It is also understood and agreed, that as the time of any of said twenty-five hands expires, other hands are to be received in their stead from said sixty hands leased from said Gordon, so as to keep up the number to twenty-five during said term of eight years. It is also understood and agreed that said Mitchell assumes no liability of said Cox to said Gordon. It is further agreed that if the lease is abrogated from any cause not attributable to the fault or neglect of Mitchell, then and in that event the account of Mitchell against Gordon & Cox is to have full force and effect, any statute of legislation to the contrary notwithstanding. In witness whereof we have hereunto set our hands and seals the day and vear first aforesaid.

Executed and delivered in presence of (Signed) EDWARD COX, EDWARD C. THOMAS, J. D. MITCHELL."
W. S. THOMSON, N. P., Fulton Co., Ga.

The construction which the court placed upon these two contracts in his charge to the jury, constitutes the basis of the errors of law contained in the motion for a new trial.

He held the first to be an illegal and void contract, under which neither of the parties could take any rights, and so instructed the jury. Was this error?

It does not appear to us that there can be any two constructions of this contract, and that it was clearly a subletting of convicts by Cox to Mitchell, for the space of eight years, at the rate of thirty dollars each, and they were first to be held by Mitchell for the taking up of the mortgage made by Cox to C. B. Howard, and afterwards in full settlement of account of Mitchell against Cox & Gordon.

These convicts were held, as the proof shows, under the lease act of the general assembly of Georgia, and by the sixth section of which act it is made illegal to sublet, for lease, or hire out said convicts, and if done by the lesses, or permitted to be done, the governor is to proclated to vacate the lease. The contract being forbidden by law, it

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was without any force or legal effect, and was properly so ruled by the judge.

Upon the second contract he instructed the jury in sub stance, that it was not illegal on its face as was the other but when taken in connection with other testimony bearing upon it, they could then determine whether it was an accord and satisfaction and, as such, discharged the liability of the defendant, Gordon, or else illegal, as they believed the facts to be. If, on the 20th day of March, 1879, Mitchell in fact became the agent of one of the lessees, and took charge of the convicts, and was to work them on the defendant's, Gordon's, plantation under the lease and according to law, and subsequently defendant, Cox, made a contract by which he was thus to work them, the contract would be legal. But if at the time of the execution of the contract it was expected and contemplated between Cox and Mitchell that Mitchell was to take them off and carry them to his camp, and work them on his place, the same not being embraced in defendant's, Gordon's, place, but on Mitchell's, then neither party could claim any rights under such contract. He further instructed them that if they found the facts to be such as to make the contract legal, then it would be necessary for them to inquire whether these convicts were lost to Mitchell by any fault of his own, for if they were lost for any other reason than the fault of Mitchell, then the contract was not to be in payment of the debt due by Cox & Gordon to him. If, therefore, Gordon came in and asserted any right he had as lessee, and sold such right to Howard, who with the aid of the principal keeper of the penitentiary, took from Mitchell these convicts, then their loss to Mitchell could not be considered as his fault, if he were working them where and as was contemplated and expected that they should be by Cox and himself when the contract was made.

We must confess that we see no error of law in this charge to the jury. And if Cox violated his contract with

Gordon, as agreed upon in their dissolution, and violated the law under and by which he was to work these convicts, and Gordon thereupon asserted his rights as lessee, then, by re-possessing himself of the convicts held by Mitchell to pay in part the debt due him by Cox & Gordon, without the fault or consent of Mitchell, the payment failed, and the firm of Cox & Gordon became liable by reason thereof to answer for their debt to him as though no payment had been attempted by the contract. The jury having found the facts to be. as appears by the verdict, that Mitchell held the convicts under an illegal contract made by Cox with him, and that Gordon resumed his control and authority over them, the payment failed and the debt stood unsatisfied against the firm, just as it did before, the illegal bargain was made. To say that a debt due Mitchell from Cox & Gordon was to be paid by the labor of convicts for the space of eight years, who were taken away from him in the space of a few days, by one of the partners having the legal power to do so, would be to say that the contract was binding on Mitchell but not on Cox & Gordon.

- 4. The motion for a new trial was amended by adding two other grounds thereto of requests to charge, which were refused, and were substantially as follows:
- (1.) That if the partnership between Cox & Gordon was dissolved, and Mitchell had notice thereof, and he then entered into a written contract with Cox upon additional consideration and accepted other property from Cox in payment of the indebtedness of Cox & Gordon, such agreement would be a discharge of Gordon.

We find no testimony in the record which we think lays the foundation for such a charge; and it was therefore properly refused.

(2.) That if prior to the commencement of this action the plaintiff instituted one in the county of Taylor, based on the contract of March 29th, 1879, between Cox & Mitchell and Mitchell was still insisting upon a performance there-

of, that he would be estopped to deny the equity and binding force of the contract to avoid its legal effect.

The evidence discloses the fact to be that the plaintiff was not insisting in that court upon the performance of the contract; that it was not such a right as the court could enforce; and besides, there had never been any service upon the parties.

There was no error in the refusal.

5. Touching the exceptions taken on the hearing of the motion for a new trial, we hold that the right of the superior court to grant a new trial on terms is well settled in this court; and if the terms be not complied with, the verdict will stand.

With equal propriety, we think, the judge may propose terms, and on the refusal beforehand to accept them, he may refuse the grant. The only effect of such an offer is to show that he was not fully satisfied with the verdict, and to detract from the full force of the rule, that this court will not disturb a verdict as contrary to evidence, if it be approved by the presiding judge as sustained by the evidence, unless he has abused his discreson in refusing it. In this case, however, the judge certifies, "that the mind of the court was not dissatisfied with the amount of the verdict in the technical or legal sense, so as to require a new trial under the rules of law."

With this statement explanatory of what he said to the defendant's counsel in overruling the motion for a new trial, puts this case within the reason affecting the usual judgments of refusal.

Judgment affirmed.

Huntington vs. Bonds.

#### HUNTINGTON vs. BONDS.

- 1. The verdict is supported by the evidence.
- (a.) Trover being brought for a half interest in four several bales of cotton, described separately and their weights given, proof of proper sale and disposition of proceeds as to a part would not prevent a verdict for the balance.
- 2. Newly discovered evidence tending to show a fact which, if true, must have been known to the defendant before the trial, and which was not only not used as a ground of defence, but was directly in conflict with that actually set up, is no ground for a new trial on behalf of the defendant.

New Trial. Trover. Newly Discovered Evidence. Before Judge UNDERWOOD. Polk Superior Court. February Term, 1881.

To the report contained in the decision, it is only necessary to add that the newly discovered testimony was to the effect that Bonds had stated that he had nothing to do with the cotton, that he was farming on shares with one hand (whose administrator was a co-defendant in the trover suit with Huntington), and that the latter was to dispose of the cotton, pay debts, and pay him one-half of the proceeds.

. J. A. BLANCE, by E. N. BROYLES, for plaintiff in error.

IVY F. THOMPSON, for defendant

CRAWFORD, Justice.

1. Milburn Bonds sued A. Huntington and J. W. T. Hand in an action of trover to recover the one-half interest in four bales of cotton which he alleged had been wrongfully converted to their use. Upon the trial, the jury returned a verdict for Bonds for \$37.50, whereupon the defendants below moved for a new trial because the verdict was contrary to law—contrary to evidence, with-

Huntington vs. Bonds.

out evidence to support it, and because of newly discovered evidence. The motion was overruled and the defendants excepted.

The testimony of Huntington was that he sold the four bales of cotton, and appropriated the proceeds by the direction of Bonds. This is flatly denied by Bonds in his testimony, who swears that he never authorized the sale of the cotton nor any disposition of the proceeds. Huntington also testifies that after he had sold the cotton, he paid by the order of Bonds an account of his due to Ford & Glenn for \$48.94, and retained on an account due to himself \$13.80, all of which was approved by Bonds.

The jury found that so much of this cotton as was thus sold was sold by authority, and therefore that the plaintiff, Bonds, could not claim a wrongful conversion thereof; but as to the balance, they found that he had wrongfully converted it, and gave him a verdict for the said amount of \$37.50. This suit being for one-half of four bales of cotton which are separate and distinct pieces of property, and designated by their different weights and numbers, differs in that respect from the case of Campbell vs. Trunnell, decided at this term, not yet reported, and is therefore not in conflict with it, although that case sounded also in trover.

2. Upon the newly discovered evidence, it sets up as a ground of defence a fact which, if true, must have been known to the defendant, Hand, but which was not made by him in his life-time, nor by his administrator after his death, and which is wholly inconsistent with the defence, actually made on the trial. There is testimony enough to sustain the verdict, and the newly discovered evidence is in conflict with that of the defence in legal effect, and not sufficient to authorize a new trial.

Judgment affirmed.

#### Ashton vs. The State.

#### ASHTON US. THE STATE OF GEORGIA.

- 1. Where a dwelling-house was occupied by one in charge of a plantation, and he ordinarily slept in one room of it, the entire house was his dwelling-house, although another room may have been occasionally occupied as an office or bed-room by another, who while there was the master.
- 2. The act of 1879 (page 65) did not alter the law of burglary otherwise than to put burglary, whether committed in the day or night, on the same plane in respect to punishment.

Criminal Law. Burglary. Master and Servant. Laws. Before Judge SNEAD Richmond Superior Court. April Term, 1881.

Ashton was indicted for burglary. The indictment alleged that he broke into and entered a certain house, the property of Eliza W. Moore, and used as a dwelling house by one Albert Maddox, with intent to steal certain goods belonging to one William H. Warren.

The evidence was, in brief, as follows: The house belonged to Mrs. Moore, and was situated on a plantation. Maddox was the foreman or manager of the place, and occupied one of the rooms as a bed-room while on the plantation. He had a home in town, but would go to the place constantly. Warren, who seems from the evidence to have been conducting the planting, would at times go to the place, and sometimes slept in one of the rooms, and when there used it as an office. Defendant was caught after having broken into the office-room where there were articles of value.

The jury found a verdict of suilty. Defendant moved for a new trial on the following among other grounds:

(1.) Because the court charged the jury as follows: "I charge you if you find that one of the rooms of this house was used by Albert Maddox as a dwelling, it was, in the eyes of the law, the dwelling-house of Albert Maddox."

Ashton vs. The State.

(2.) Because the verdict was contrary to law and evidence.

The motion was overruled, and defendant excepted.

THOS. S. BEAN, for plaintiff in error.

BOYKIN WRIGHT, solicitor general, by F. L. HARALSON for the State.

JACKSON, Chief Justice.

- I. The defendant was convicted of burglary; ne broke and entered a dwelling-house; it must have been with the intent to steal, though he was caught before he committed the felony. The house belonged to Mrs. Moore, as charged in the indictment; it was used as a dwelling-house by Albert Maddox as charged, because he occupied one room of it generally, and had charge of it as foreman of the hands on the plantation. It made no difference that Wm. H. Warren, occasionally when visiting the plantation, lodged in one room, even if he were master, and Maddox servant, when he was there. It was more constantly used by Maddox as a residence or domicile than by Warren. We see no material error in the ruling of the court on these points.
- 2. The act of 1879 (laws of 1879, page 65) leaves the definition of burglary as it stood before in the Code. Its effect is simply to alter the law of burglary in respect to punishment, putting burglary in the day-time and at night on the same footing, and leaving it to the judge to punish either at his discretion within the extremes of the penalty prescribed—any term of time between the shortest and longest time prescribed.

It seaves burglary a crime, whether the breaking and entering with felonious intent be made day or night.

Judgment affirmed.

#### CLAYTON & WEBB 2'S. MAY.

- 1. When the judge of the superior court amends a bill of exceptions, or causes it to be done, by striking out portions of it, some allusion should be made to such amendment in his official certificate, so that this court may know that parts of it have been obliterated by his direction; the better practice, however, as well as the more legal course, is to decline to sign and certify it at all until re-written so as to present an intelligible and unmutilated bill of exceptions and assignment of errors for review here.
- 2. Where, by direction of this court, the clerk of the superior court transmits a certified copy of the bill of exceptions from the official copy retained in his office, and it conforms in all respects to the original in this court, with the parts so stricken omitted, we will presume that the portions stricken from the original were stricken by order of the judge.
- 3. In his abstract and brief, counsel for plaintiff in error has no right to base any position of fact or argument upon any part of the bill of exceptions so stricken; and if it be done, such positions will be wholly disregarded because their foundation crumbles for want of the certificate of the judge; especially when the transcript of the record fully accords with the action of the judge in striking those portions of the bill of exceptions—such portions referring to written demurrers of record.
- 4. Where defendant demurred to the second ground of amended illegality, which was as follows: "There is no judgment to support the execution, it does not follow the judgment," and excepted to the ruling of the court and assigned error thereon, and where all objection to the said ground of illegality because it was an amended ground without swearing that defendant did not know of that ground when the original affidavit was filed, was stricken from the bill of exceptions, and no such objection appears anywhere of record, the exception and assignment of error will be confined to the point that the execution does not follow, and is not supported by the judgment.
- 5. Where the judgment is against a partnership and the execution is against, not only the partnership but the individual members thereof, not as members of it but as distinct persons, the variance is fatal.

Practice in Supreme Court. Practice in Superior Court. Judgments. Executions. Illegality. Before Judge WILLIS. Muscogee Superior Court. May Term, 1881.

Clayton & Webb obtained a judgment against T. D. May & Co., a firm composed of May and J. W. Clayton. To the levy thereunder May filed his affidavit of illegality. Subsequently he amended it by adding new grounds, one of which was that the execution did not follow the judgment. (The fi. fa. was against T. D. May, J. W. Clayton and T. D. May & Co.) The case went to the superior court by appeal. The court sustained the illegality on the above stated ground alone, and quashed the fi. fa. Plaintiffs excepted.

For the other facts see the decision.

- S. B. HATCHER, for plaintiffs in error.
- J. M. RUSSELL, by S. W. GOODE, for defendant.

JACKSON, Chief Justice.

I. When we examined the bill of exceptions in this case, it was discovered that the abstract of plaintiffs in error did not accord with it. The point made in the abstract and brief and argument was that the illegality had been amended without the requisite affidavit that affiant did not know of the ground taken by the amendment when the original affidavit of illegality was made. All allusion to that point was stricken out of the bill of exceptions by having black lines drawn across that portion of the bill of exceptions which referred to it, and we could not ascertain from the certificate of the judge, or any other part of the bill of exceptions, who struck that part or by whose order it was done.

It is the duty of the judge, when he certifies the bill of exceptions, to see to it that a plain and unobliterated bill of exceptions, distinctly assigning the errors complained of, and containing the facts necessary to enable this court to adjudicate the cause, be made out; and if it be untruthful to decline to certify, with his reasons therefor, as provided for in section 4257 of the Code. It seems to us

that this is the legal course. If, however, he sees fit to obliterate any part of it, he ought certainly to write somewhere on the bill of exceptions that he did it, or ordered it done, so as to assure this court that nothing improper has been done by any unauthorized person; that nobody has changed the bill of exceptions since it left his hands. Otherwise this court will be involved in doubt about it. The more legal course, and the better practice, would be, if anything be in the bill of exceptions not consistent with what transpired before the court on the trial, to require the bill of exceptions re-written so as to present a clean and unmutilated record for inspection here and preservation on the files of this court of record.

- 2. In this case we were obliged to send to the clerk of the superior court of Muscogee county for a copy of the official copy, reserved in his office, duly certified by him. We find that this certified copy is the same as the original here, with the obliterated parts left out. It is presumed, therefore, that the judge himself made that obliteration or ordered it to be done, and that no unlawful hand has interfered with the bill of exceptions as it came from the judge. So presuming, we take no further action upon it than this allusion to and remark about it.
- 3. But, surely, counsel acted very indiscreetly in making his abstract conform not to the bill of exceptions as stricken and modified by the judge, but as written by himself originally before so altered. From a correspondence with the clerk of this court with him by our direction, we are satisfied, however, that it was an indiscretion by him and nothing more; and, therefore, we forbear to press investigation further. From that correspondence, it seems that he thought the bill of exceptions was left in legal effect as it stood before it was so obliterated in part. We must, however, disregard entirely any point made by him on the obliterated part of the bill of exceptions, and consider only the case made by the bill as amended; especially as the amendment of the judge, in striking part of it, accords with the transcript

of the record. The amendment strikes out all allusion, as ground of demurrer to the second amended affidavit of illegality, to the absence of an affidavit that the ground was not known when the original affidavit of illegality was taken, and confines the ground to the single point that the judgment did not authorize the execution; that the execution did not follow it. And the transcript of the record shows that this point alone was in the demurrer.

4. We must, therefore, decline to consider at all the point that the defendant in fi. fa. did not swear that he did not know his amended ground when he took his first affidavit of illegality, because that point was not made before the court below, and this court can only reverse it on its ruling. The point may have been waived in the court below; the amendment may have been allowed by consent; it may have been done in the justice court, as it was on an appeal to the superior court. It is enough that the point was not made. The judge does not certify it, and the transcript of the record does not show it.

Besides, if it had been made, the defendant could then have sworn that he did not know it when he took the original affidavit, and why should he not then have been permitted to show by oath that he did not know it?

There might have been some trouble to do so in this case, as the ground of the amendment is that the execution did not follow the judgment, which ground was apparent all the while on the face of the papers; but we must be governed by general rules applicable to all cases, and it will not do to reverse the court on a point not made before it, and which, if made in ordinary cases at least, if not in all cases, could be cured by amendment.

5. The sole question, therefore, for us is, does the execution follow the judgment, or, in other words, does the judgment authorize the execution? The answer to this question depends on the answer to another: Is the variance between the two material?

The judgment is against a firm—a partnership. The execution is against not only the partnership, but individuals. Doubtless they are the individuals who compose the firm; but the execution is against them, not as persons who compose the firm, but as individuals—persons distinct from the same persons as members of a firm. We think that this variance is material. It is true that when partners are served personally, as these were, the execution may be levied on the private property of those served. Code §3351; but this is quite a different thing from issuing the execution against them individually when the judgment is against them as partners.

When partnerships assets and individual assets come to be applied to judgments against partners and those against individuals who are members of the partnership, the importance and materiality of the variance become appa-Sections 1918 and 3154 of our Code provide how the partnership and individual assets shall be applied to creditors of the partnership and of the individual members of the firm. Partnership debts, when joint assets are exhausted, may go upon individual assets; but the individual debts, without regard to dignity as compared with the joint debts, must first be advanced the pro rata amount received on joint debts from joint assets. In this case the judgment is a debt of record against the partnership. It is a joint debt. The execution is a process to enforce, not only this joint debt of the partnership, but an individual debt of each of them. The first is a joint debt—the latter is not only a joint but an individual debt. The variance is wide. It is as material as wide, and therefore fatal.

Judgment affirmed.

# BLANCHARD, WILLIAMS & COMPANY vs. PASCHAL.

- 1. A partner may have an exemption set apart out of partnership property. The assets of a partnership belong to the individuals composing the firm. The partnership is not a separate entity whose debts must be paid before the members have title to the property.
- (a.) That a severance of the partnership property was made after levy by a creditor of the firm, and one member then applied for an exemption out of the part taken by him, did not affect his right to an exemption.
- That all the partners in a firm had withdrawn their capital did not ipso facto, take away the right of one of them to a homestead.
   Fraud must enter into the transaction to effect that result.
- 3. 4. One of the issues on an application for homestead being whether the applicant had made a full and fair disclosure of all his property, and it appearing that a firm of which he was a member, and from whose assets he sought to have the exemption made, had shortly before been in possession of a large amount of property or money, the burden was on the applicant to account for it.

Homestead. Partnership. Levy and Sale. Fraud. Before Judge WIMBERLY. Talbot Superior Court. September Term, 1880.

Paschal was a member of the firm of Paschal & Heidingsfelder. Blanchard, Williams & Company were judgment creditors of the firm. Their fi. fa. was levied on the stock of goods belonging to the firm, and the sheriff took possession. The partners then took a list of the goods, and each selected certain goods as his and relinquished to the other his interest in the balance. Paschal thereupon applied for homestead and exemption out of the goods falling to his share and other property. Blanchard, Williams & Company objected. The ordinary granted the application, and the case was appealed. The jury found for the applicant. The objectors moved for a new trial, which was refused, and they excepted.

For the other facts see the decision.

PEABODY & BRANNON, for plaintiffs in error.

WILLIS & WILLIS, for defendant.

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# CRAWFORD, Justice.

- W. O. Paschal, of the firm of Paschal & Heidingsfelder, filed his petition and schedule for homestead and exemption. Blanchard, Williams & Company, creditors, objected to the schedule, and disputed the value of the personalty. Upon the trial of the case in the superior court, to which it had been appealed, the jury rendered a verdict for Paschal. Blanchard, Williams & Company made a motion for a new trial, which was overruled, and they excepted.
- I. The questions made by the record are, first, whether, if a portion of the personal property included in the schedule of applicant belonged to the firm of Paschal & Heidingsfelder at the time the same was levied upon, and no severance had been made by the partners at that time, he was entitled to an exemption in such portion?

This exact question has never been ruled by this court. In 57 Ga., 229, it was held, where each partner had applied for a homestead in partnership land, the same being assigned to them severally in separate parcels, a prior creditor, on reducing the debt to judgment, could not enforce the judgment over the homestead right.

In 59 Ga., 397, an injunction was refused to a partner who sought to enjoin the wife of another member of the firm from taking homestead in the partnership land, on the ground that the property was partnership property, and needed to pay partnership liabilities.

Again, it was ruled in 63 Ga., 586, that a homestead in the undivided half of the real estate belonging to a firm may be set apart to the wife of one the partners, and such homestead will be valid against general creditors of the firm.

In the first case cited there had been a partition of the lands by the partners, between themselves, before the judgment. In the second case, where the injunction was refused, the homestead had been set apart out of the undivided half of the premises. In the third case it was also

set apart out of the undivided half of the real estate belonging to the partnership.

In the case before us it was after the levy that the settlement or severance was had by the partners, and it is claimed that it was then too late for any act of the partners to affect the rights of creditors, or to authorize the exemption, even if the right existed before the judgment, until after the partnership debts had been paid.

The theory of the plaintiff in error is that the partnership property must go to the payment of the partnership debts, before any individual interest can exist, whereas, in fact and in law, the individual members of the firm are the real owners of the partnership property. And although the law directs how debts shall be paid, it never loses sight of the fact that a partnership is made up of individuals who own the assets. It is nevertheless true, that in the absence of any legal provision giving a different direction to the disposition of the assets of a firm, they would have to be paid out as claimed. But here is interposed between this disposition of the property which an individual may have in a partnership, another overriding and superior right thereto, which no court or ministerial officer can disregard, and no officer has the jurisdiction or authority to seize or sell, except for certain specified debts, in which partnership debts are not included.

Unless, therefore, partnership property is to be appropriated to partnership debts, regardless of all individual rights, then whether the same was levied upon or not is wholly immaterial, as the judgment and levy can give the creditors no higher right as against an exemption and homestead than they had before.

Any other construction of the constitutional provision, and the laws passed in pursuance thereof, would be to put partnership debts upon a higher footing than individual debts, and on the same level with those excepted in the constitution, as well as to deny the right of homestead and exemption to possibly one-fifth of the heads of families in the state, and who happen to be engaged in part

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nership pursuits. And the constitution, in effect, would then be made to read, that each head of a family in this state shall be entitled to an exemption of personalty, and a homestead of realty, except partners, and they shall be excluded until they pay off and discharge all their partnership liabilities.

2. The second ground of error alleged is the refusal of the court to charge the jury that if, when the application was made, each of the partners had withdrawn all their capital from the firm, then the applicant was not entitled to exemption.

We do not think that this charge should have been given just as requested, for the partners might have withdrawn their capital without its being done fraudulently, and if so, such withdrawal should not have denied to the applicant the right to an exemption.

3, 4. The third ground of error was the refusal of the court to charge the jury, that, if a short time before the application, it appeared that the firm had a large amount of property or money on hand, then the burden was on the applicant to account for it.

It appears to us that this was a very proper request in view of the testimony, and should have been given. All applicants for personal exemption should come into court ready and willing to account for any large amount of property or money which they may have had only a short time before the application. That is to say, when one of the issues is, that a full and fair disclosure of the personal assets of the applicant has not been made, and the creditors show that the applicant did have a large amount of property or money on hand, so immediately before the application as to create the presumption of the concealment or withholding of such property, then that presumption ought to To require the creditors to show assets at be rebutted. the very time of the application would be too narrow a view of the law. But we do not mean to say that any expenditure, though recklessly or improperly made, proMcLendon, sheriff, for use, vs. Smith et al.

vided not done so as to reserve the same in some way for himself or family, would defeat the homestead and exemption right. Code, §2005.

On the fourth ground we think that the charge was too sharply limited to the exact time of the application, in making a full and fair disclosure of the assets, under the testimony which had been submitted, and the reasons for which are the same as contained in the last ground considered.

The remaining grounds rest upon the evidence, and if there were no legal error in the manner in which the case was submitted to the jury, the verdict would have to stand, but as we hold that there was, we express no opinion.

Judgment reversed.

SPEER, Justice, concurred on the question of partnership on the ground of *stare decisis*, but not as an original proposition.

# MCLENDON, sheriff, for use, vs. SMITH et al.

- 1. Pending an appeal to the supreme court from a decision on a writ of habeas corpus refusing to release a prisoner, can the court discharge him from custody on any terms? Quære.
- 2. An attorney having been imprisoned under attachment for failure to pay over money to his client, a writ of habeas corpus having been sued out in his behalf, a judgment remanding the prisoner to custody rendered, and the case having been carried to the supreme court, if the defendant be discharged on giving bond to the sheriff "to render his body in prison in execution of the order remanding him, in the event such order should be affirmed," on failure to comply therewith, after an affirmance, no recovery can be had either by the movant in the attachment or the sheriff for his use.

Habeas Corpus. Supersedeas. Bonds. Sheriff. Before Judge PATE. Schley Superior Court. March Term, 1881.

Reported in the decision.

McLendon, sheriff, for use, vs. Smith et al.

J. N. SCARBOROUGH; GUERRY & SON, for plaintiff in error.

B. B. HINTON; B. P. HOLLIS; W. A. HAWKINS, for defendants.

SPEER, Justice.

Bush obtained a rule absolute against A. J. Smith, an attorney at law, for money collected and not paid over. He had an attachment issued and had defendant arrested and imprisoned under the same. S. W. Smith (one of the sureties), in behalf of his brother, the defendant, sued out a writ of habeas corpus against McLendon, sheriff, who had defendant in custody. The court, upon the hearing, remanded the prisoner to jail. The defendant, Smith, tendered his bill of exceptions, and, in order to supersede the judgment, asked the judge the privilege of giving bond, and the judge thereupon appended to his certificate to the bill of exceptions an order, which was as follows: "That upon A. J. Smith giving bond and security in the sum of five hundred dollars, to render his body in prison in execution of the order remanding him, in the event said order should be affirmed by the Supreme Court, the sheriff will discharge him from custody. The said bond to be approved by the sheriff of Webster county." The defendant thereupon tendered his bond, with S. W. Smith and H. Beckworth (they, as well as defendant, acting voluntarily) as securities. The sheriff approved and received the same. The Supreme Court affirmed the order and judgment of the court below, and the judgment of that court was made the judgment of the Superior Court. In the meantime, A. J. Smith fled the realm, and continued to abscond and to remain beyond the jurisdiction of the state and court, thus failing and refusing to render his body in prison, in execution of the order and in compliance with his bond. McLendon, thereupon, suing for the use of Bush, filed his declaration in Schley superior court, against the two securities who resided in Schley, alleging the absence and McLeadon, sheriff, for use, vs. Smith et al.

non-residence of A. J. Smith, and setting forth in detail and in substance all the foregoing facts. The defendants were duly served. On the trial, they demurred to said writ, on the ground that plaintiff was not entitled to recover on the case made in his declaration and amendments. The court sustained the demurrer and dismissed plaintiff's suit, to which ruling plaintiff excepted, and assigns the same as error.

We concur in the judgment of the court below in sustaining the demurrer to this declaration. It has been held by this court, in 34 Ga., 101, "That the filing of a bill of exceptions to the decision of the judge below, in habeas corpus cases, does not operate as a supersedeas. applicant must remain in the condition in which he was placed by the judgment, whether exception be taken or not." Here a judgment was taken, remanding the applicant to custody under the original judgment entered upon the attachment for contempt; but on a bill of exceptions tendered, the judge ordered his discharge on his entering into bond in the terms and conditions as set forth in this This is not in terms (or in form, under the statute) a supersedcas bond, nor is it claimed to be such by counsel for plaintiff in error. It might well be questioned, under the decision referred to, whether the judge had any authority in law, under this application and judgment thereon, to discharge from custody the principal obligor in this bond on any terms, except by satisfying the judgment. In the decision referred to the court say, "no bond is authorized to be given so as to compel his attendance to abide the final order, judgment or sentence of the court, and yet that attendance is necessary. Nor could the court require the bond to be given, for there is no one authorized to collect or recover the money in case of its forfeiture." But we do not place this judgment of affirmance on that ground. Here is a bond, taken not in the nature of a supersedeas bond, but conditioned to "render his body in prison in execution of the order remanding

McLendon, sheriff, for use. vs. Smith et al.

him, in the event said order should be affirmed." What interest has the usee of plaintiff in error in any recovery on this bond, so far as it appears in the instrument itself? There is no obligation or undertaking by these defendants, to pay him anything, either in damages or otherwise. The declaration cannot legally aver, or evidence be admitted to show, any liability on the part of these defendants beyond the terms of their undertaking. And by its terms they assume none to him; they are responsible to the letter of their undertaking-no more. But it is said that the sheriff, the obligee, may sue and recover. Cui bono—what damages have resulted to him by the failure of the defendants to keep their covenant? None is alleged, and we presume none can be proved. If there was no authority in law to take this bond, and the principal obligor was suffered to go at large, his discharge might be an escape, against which the officer, from reasons of public policy, would not be allowed by bond to indemnify himself. If there was authority to take the bond, then he, as the obligee, must aver and show he, or some one for whose use it was taken, was damaged or incurred liability by reason of the defendants failing to keep their undertaking according to its terms. either view of this case, then, we can see no cause of action accruing either to the officer, or his usee on this bond. from the facts set forth in the record. It may seem to be a hard case on the plaintiff in error's usee that, by reason of this order of discharge, he should fail to enforce his judgment in the mode he was seeking by attachment. But we cannot adapt the rules of law to the exigencies of what appear to be seeming hardships. These rules must be our guide, and upon them our decisions must rest. To hold that they must yield to what may appear to be the exigencies of a hardship to the litigant, would leave us without light to guide our way.

Let the judgment below be affirmed.

# LEWIS & COMPANY vs. CHISHOLM.

- 1. Since the act of 1881, where only one of two joint defendants moved for a new trial, and the bill of exceptions to the overruling of the motion was in the name of both, it could be amended so as to conform to the record.
- (a.) Would not a reversal, on exception, by one joint defendant, work a reversal as to both? Quare.
- 2. A landlord leased certain stores to tenants at a stipulated price, payable monthly. The landlord agreed to keep the building in good repair, and to pay the tenants any damage they might sustain by his neglect to do so.
- Held, that the covenant to pay rent and that to repair were independent covenants, and, therefore, a failure to repair did not work a forfeiture of the rent, but gave a right of action, or of recoupment to the tenant.
- 3. Where a landlord covenants to keep premises in repair, his failure to do so, whereby their use by the tenant is impaired, will not work a forfeiture of the rent, unless the premises become untenantable and a constructive eviction results. The remedy of the tenant is, after reasonable opportunity to the landlord, and failure by him to repair, to make the repairs himself and look to the landlord for reimbursement, or to occupy the premises without repair, and hold the land-ord responsible for damages by action, or by recoupment to an action for the rent.
- (a.) In Georgia the duty of keeping premises in repair is on the landlord, in the absence of any covenant on that subject.

Landlord and Tenant. Contracts. Damages. Before Judge HILLYER. Fulton Superior Court. April Term, 1881.

Reported in the decision.

- MYNATT & HOWELL, for plaintiffs in error.
  - E. N. Broyles; Alex. R. Jones, for defendant.

SPEER, Justice.

The defendant in error sued out a distress warrant against the plaintiff in error to recover an amount claimed

for rent, under the contract stated in the following affidavit:

"STATE OF GEORGIA—Fulton County.

In person appeared before me, the undersigned, a justice of the peace in and for said county, W. P. Chisolm, agent for Mrs. Martha B. Chisolm, who being duly sworn, deposes and says, that heretofore, on the first day of September, in the year 1875, said W. P. Chisholm made and entered into a certain written mutual agreement with Henry Lewis and T. Sumner Lewis, partners, under the firm name and style of H. Lewis & Co., a copy of which said agreement is as follows, to-wit:

Memorandum of an agreement made this first day of September, A. D. 1875, between Willis P. Chisolm, agent for Mrs. Martha B. Chisolm, of Atlanta, Fulton county, Georgia, of the first part, and Henry Lewis and T. Sumner Lewis, doing business in the firm name of H. Lewis & Co., of the same place, of the second part:

Witnesseth, said Chisolm, agent, agrees to lease, and by these presents does lease, to the party of the second part a building just completed by Messrs. Cook, Gunby & Co., two stores, brick and rock basement, on the south side of Alabama street, near the Georgia Railroad depot, in said city of Atlanta, for the term of ten (10) years, with the privilege of five (5) years more, making fifteen (15) years in all, for the annual rental of thirteen hundred and twenty (1320) dollars, payable monthly, one hundred and ten (110) dollars per month. He further agrees to keep the building in good repair, and to pay said H. Lewis & Co. any damage they may sustain by his neglecting so to do, also to protect them in the peaceable occupation of the premises against any party or parties whatsoever.

In the event the building shall be destroyed by fire or otherwise, the rent is to cease until it can be replaced, which said Chisolm, agent, agrees to have done without unnecessary delay.

In consideration of the above, said party of the second part agrees to pay the rent as above specified.

In witness whereof, said parties hereto affix their names and seals.

H. Lewis & Co. [L. s.] W. P. Chisolm,

Agent for Mrs. Martha B. Chisolm, [L. S.]"

To this distress warrant the defendants below filed their counter-affidavit, denying any rent was due or to become due, alleging that plaintiff had failed to keep the premises in repair as he had agreed to do, by reason of which de-

fendants were forced to leave the premises. They also pleaded, by way of recoupment, fifteen hundred dollars damages, sustained by reason of the failure of plaintiff to keep the premises in repair, and cost of their removal, loss of time, employes, etc. On the issues thus made, the jury, under the evidence and charge of the court, rendered a verdict for the plaintiff. A motion for a new trial was made, on various grounds as set forth, which was overruled, and defendants excepted.

When the case was called here a motion was made to dismiss this writ of error on the ground that T. S. Lewis, one of the defendants, alone made a motion for new trial, and to the refusal of which H. Lewis & Co. filed their bill of exceptions.

It appears from the record the distress warrant was sued out against H. Lewis & Co., who were the parties defendant that signed the contract of lease, and who also filed the counter-affidavit, and the cause thus proceeded to judgment, but that T. S. Lewis, one of the defendants, in his own name, filed the motion for new trial. That he had the right to make the motion for new trial is not questioned, but whether H. Lewis & Co. could except to the decision rendered against him, refusing a new trial, is the question. That this bill of exceptions would avail T. S. Lewis there is no doubt, since it could be amended by striking the other co-plaintiff, and thus make it conform to the record. See Acts 1881. It, however, is not necessary for us, under the view we take of this case, to decide what would be the effect of the judgment below, as to H. Lewis, in the event of a reversal here of the judgment excepted to by T. S. Lewis. If we analogize it to a case of appeal the rule is, where one or more of the parties appeal and the others refuse, the whole record is taken up and all shall be bound by the final judgment, but in case damages shall be awarded upon such appeal, such damages are recoverable alone against the party appealing and his security, and not against the party failing or refusing to appeal. Code, §3620.

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So Powell on Appellate Proceedings lays down the rule: "If the judgment be against several as a joint judgment and joint interest, and not severable, it is an entirety, and the reversion will be as to all, though the error assigned affected and related to the case of one only; as where there is a judgment against two for the payment of money and one is an infant, against whom the judgment would be erroneous, upon error the judgment would be reversed as to both." Powell on App. Proceedings, 285; 14 Ohio, 413.

But it is not necessary for us to decide this question. We will treat it as though the bill of exceptions were amended by the record, and the only plaintiff in error before this court was T. S. Lewis. Neither do we intend to say that this motion for a new trial should not have been demurred to on the hearing below, so as to allow the amendment and have proper parties made then. It was evidently a mere clerical omission, as appears from the whole record; and the judgments we here pronounce will dispose of these questions without deciding them. The motion to dismiss the writ of error is therefore overruled.

2. The important legal question that is involved, and which must control the controversy between these parties, is to be found in the charge given by the court to the jury, and made a ground of exception in the fourth ground of the motion for new trial, as follows: "The court is of opinion and so instructs you that, under the contract of lease, which you have out before you, the covenant of the landlord to make repairs is an independent covenant, and a mere failure to make repairs to the extent of merely diminishing the value of the use of the premises, and not to entirely destroy it, would not defeat his right to recover, but would authorize the diminuition of the rent to an amount that you find is right for a failure to make repairs."

Was the court right in advising the jury that the covenant of the landlord to make repairs, under this lease, was

an independent covenant? For if so, then the consequences stated by the court follow logically, and plaintiff below is entitled to recover, subject, of course, as the court said, to such diminuition of the rent as the jury might find is right for the failure to make repairs.

The Code declares that the dependence or independence of covenants or conditions must be collected from the intention of parties, viewing the entire instrument. In dependent conditions, the failure of the person first required to act, is an excuse to the other party for failing to comply. If the conditions be independent no such excuse avails. The law inclines to construe conditions to be independent. Code, §2298.

The question presented then, was the covenant by the lessees to pay rent dependent upon the covenant of the lessor to make repairs? It will be noted that the covenant of the lessee to pay rent was fixed as to amount and time, one hundred and ten dollars monthly, whereas the lessor covenants to keep the building in good repair, and (as a penalty for failing to do so) he covenants to pay said H. Lewis & Co. any damage they may sustain by his neglecting to do so. Here the one covenants to pay rent, the other to repair; but so far from the payment of rent being dependent upon the making repairs, they mutually agree if he fails to make the repairs, that the lessor shall be liable to the lessee for damages for the neglect. The failure to repair is not to work a forfeiture of rent, but, on the contrary, the lessor, for his failure, is to answer in damage, and this he expressly stipulates to do.

Taylor, in his treatise on the American Law of Landlord and Tenant. (7th ed., 1879.) §265, says: "That whether covenants are dependent or not is to be collected from the sense and meaning of the parties, not from any technical words contained in the instrument, and their precedence depends on the order of time in which the intent of the transaction requires their performance, and not on the order in which they stand in the deed. 5 Wend., 496;

2 Doug., 684: 15 Mass., 504; 6 N. Y., 74; 5 Ib., 247; 17 Ib., 458.

"If dependent they are in the nature of conditions, and are precedent each to the other, and in that case the non-performance of one is not only a defense to the exaction of performance by the other, but is ground for an action without a tender of performance by the other. If, however, they are independent, as where a landlord engages to keep the premises in repair, or to place certain improvements on them within a specified time, his non-performance does in neither case discharge the tenant's covenant to pay rent." 5 Johns., 179; 8 Wend., 615; 1 Den., 59; 2 Pick., 292.

"But where acts are to be done simultaneously, and each is the consideration of the other, the covenants are dependent, and neither party can recover against the other without showing performance or an offer to perform on his part. 11 Wend., 67; 13 Vt., 97; 20 Johns., 136. To be dependent they must be mutual and go to the entire consideration. 52 Mo., 497."

The covenants in this lease, on the authorities cited, in our opinion, being independent covenants, there was no error in so charging.

3. The next question was, did the court err in refusing to charge, as he was requested to by counsel for defendant, "if the jury find from the evidence that the tenement in question was not kept in such condition, by repairs made by landlord, as to be suitable for the purpose for which it was rented, the tenant was not bound to pay the rent?" or was his charge to the jury correct in charging the reverse of this proposition, as is set forth in the eighth ground of the motion, "If you find there was some degree of failure to repair by the landlord, and the value of the use of the building was partially destroyed, but not entirely, then you would inquire whether there is that in the evidence to authorize you to find a diminuition of rent, and if you so find, you will take the amount off the particu-

lar month you find it applies to "? In other words, will the failure to make repairs in a lease where the covenant to repair and the covenant to pay rent are independent of each other, amount to an eviction in law and bar the landlord's right to recover rent?

The common law has always thrown the burden of repairs on the tenant. Our statute changes this rule. In the absence of a covenant to repair at common law, although the premises may become untenantable for the want of repairs, the tenant must pay the rent during the term. But where there is an independent covenant to repair, and the landlord neglects to make suitable repairs after notice by the tenant, the latter, after waiting a reasonable time, may make such suitable and necessary repairs himself and recover the expense from the landlord, or he may occupy the premises unrepaired and recover any damages he may have sustained from the landlord's default therein, provided his negligence, or that of his agents, has not been the cause of the damage. Taylor, (L. & T.,) §330; 39 Ind., 222; 35 N. Y., 269; 54 Ind. 544.

The landlord's covenant to repair, and the tenant's to pay rent, are independent covenants, and at common law a breach of the former is no bar to an action on the latter. I. T. R., 310; 3 Aust., 607; Taylor, (L. & T.,) §331; and this still remains the law, both in England and the United States. II Johns., 495; 2 Ala., 320; 24 Barb., 39; 38 Ill., 293.

"On the other hand, it is now very generally held that the landlord's failure to repair, though not an eviction, may still avail the tenant by way of counter-claim for repairs made, or recoupment against the action for rent." Taylor, (L. &. T.,) §§331, 374.

The omission of the landlord to perform his covenant does not amount to an eviction, and is no bar to a lessor's claim for rent. The lessee's remedy is either a plea of failure in diminuition of the rent, or an action to recover Shipp vs. Story.

damages for the breach of the covenant (12 Wend., 529); or to make such repairs himself as are suitable and necessary, and charge the same to the lessor, unless the premises become unterantable for want of repairs where the landlord was under covenant to repair, then this would be in law, a constructive eviction. As the rulings and instructions of the court are in harmony with these principles of law, we see no error in the charge of the court as given, or in the refusal to charge as requested, and the verdict being sufficiently sustained by the evidence, the judgment below is affirmed.

Judgment affirmed.

# SHIPP vs. STORY.

- 1. The verdict in this case is not supported by the evidence.
- (a.) In a libel suit want of malice may be shown in mitigation of damages; but after proof of the libel it will not authorize a verdict for defendant to show that he had no malice.
- The better practice is to incorporate all the exceptions taken on the trial before the jury in the motion for new trial, if made, and not to bring a part of the case to the supreme court by motion for new trial and a part directly by bill of exception.

Libel. New Trial. Practice in Supreme Court. Before Judge WILLIS. Marion Superior Court. April Term, 1881.

Reported in the decision.

E. M. BUTT; CARY J. THORNTON, for plaintiff in error.

BLANDFORD & GARRARD, for defendant.

CRAWFORD, Justice.

John Q. Shipp brought his action for libel against B. A. Story, for publishing of and concerning him the following article in the Buena Vista Argus, a newspaper in the town of Buena Vista, in this state:

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### Shipp vs. Story.

## "TO THE PUBLIC.

"One J. Q. Shipp is wanted in this county, to answer the charge of larceny after a trust. [Signed] B. A. STORY."

The defendant filed two pleas—the first "not guilty," the second "justification."

Under the evidence and charge of the court, the jury found a verdict for the defendant on the first plea. The plaintiff moved for a new trial, which the court refused, and he excepted. The grounds of the motion were,

- (1.) Because the verdict is contrary to evidence, and without evidence to support it.
- (2.) Because the verdict is so far contrary to evidence as to shock the moral sense.
  - (3.) Because the verdict is contrary to law.
- 1. The plea of justification, and the evidence in the record, puts the matter out of all dispute that the publication was the act of the defendant. Also, that the libel charged a crime, and that malice was thereby implied. The existence of malice may be rebutted by proof, and when done, it will go in mitigation of damages, but will not be a bar to a recovery. The finding of the jury, therefore, in this case, for the defendant on the first plea, was contrary to evidence, and without evidence to support it.

Had the presumption of malice been rebutted by the evidence, the verdict should not have been for the defendant; it was, therefore, error to allow it to stand. Had it been on the second plea, then that would have been sufficient.

2. It appeared in this case that there were exceptions taken to the rulings of the judge upon the trial below, which were not embraced in the grounds of the motion for a new trial, and it was moved by counsel for defendant in error that the plaintiff in error be confined to such exceptions alone as were contained in the motion for a new trial.

There has been no ruling by this court upon this ques-

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tion that we are aware of, but we do not hesitate to say that such a practice as this is irregular, if not illegal. If the party has a right to separate exceptions in this way, then he has the right to bring up his motion for a new trial, which must be made during the term in the court below, and then, within thirty days after the adjournment, he would be entitled to any exceptions had to the matters outside of those contained in the motion. At all events, there is no positive law requiring him to combine the two classes of exceptions in one bill.

Again, it is an unjust practice in this, that it allows the circuit judge no opportunity to review any errors alleged to have been committed. Moreover, one ground is sufficient to incorporate in the motion for a new trial, and then it may be amended to include all others existing up to the time of the final hearing on the motion.

Besides, the evidence in this case is part of the recordand brought up to illustrate the grounds of the motion for a new trial, and it is not allowable to come up as a part of the record in any other case. Therefore, it cannot be legally used for showing error in those other exceptions.

In view, therefore, of the whole matter, and having been requested to rule on the subject, we hold that the better practice is to incorporate all the exceptions taken on the trial before the jury in the motion for a new trial. But inasmuch as it is a new point, we will not apply it to cases brought to this court until after the present term.

Judgment reversed.

# CASTLEBERRY vs. THE STATE OF GEORGIA.

- There is no provision of law for the appointment of a member of the bar as judge pro hac vice in a criminal case.
- Want of jurisdiction in a judge will not work a dismissal of the writ of error, but a reversal of the judgment.

Jurisdiction. Judge. Criminal Law. Practice in Su

Castleberry vs. The State.

preme Court. Before H. P. Bell, Esq., Judge pro hac vice. Lumpkin Superior Court. April Term, 1881.

Castleberry was indicted for cutting down a mining ditch. Judge Brown, of the Blue Ridge circuit, being disqualified, H. P. Bell, Esq., by consent of both sides, and under approval of the court, presided as judge pro hac vice. The defendant was convicted, moved for a new trial, which was refused, and he excepted. For the other facts, see the decision.

HOWARD THOMPSON; H. H. PERRY, for plaintiff in error.

GEO. F. GOBER, solicitor general; THOS. F. GREER, for the state.

JACKSON, Chief Justice.

1. The only question necessary to the final disposition of this case is, whether under the laws of this state an attorney is empowered to act as judge pro hac vice in a criminal case, the state and the accused both consenting thereto. Prior to the constitution of 1877, and the act of 1879, there might have been some doubt, and possibly jurisdiction was given by the act of 1860, in criminal as in other cases, from the broad language of that act. See Code, §250, acts of 1860, page 43.

There was a divided court on the constitutionality of this act, even in civil cases—39 Ga., 361—but the majority upheld the validity of the act, and that decision has been repeatedly considered as law by this court subsequently. Nevertheless, by the constitution of 1877, article 6, section 4, paragraph 9, appendix to Code, §626, express power is given to the general assembly to provide by law for the appointment of some person to act as judge where the judge of the superior courts is disqualified. That paragraph is in these words: "The general assem-

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bly may provide by law for the appointment of some proper person to preside in cases where the presiding judge is from any cause disqualified," and by virtue of the authority therein conferred, the general assembly did provide by law for such cases, and confined the operation of the act to civil cases. Acts of 1878-9, page 28.

Whatever may have been the law prior to the constitution of 1877, and the act of 1879, we are quite clear that since that act went into effect, the act of 1860, and the provision of the Code on the subject taken from that act were modified, if ever operating so widely, to the extent of confining the appointment of judges pro hac vice to civil cases.

Therefore, the plaintiff in error was illegally convicted before the tribunal which undertook to try him, notwithstanding his consent, and the cause must be remanded for a new trial.

2. A motion was made to dismiss the writ of error on the ground that the person undertaking to act as judge had no power to certify to the bill of exceptions, but under the ruling at the last term in the case of Worsham vs. Murchison, the effect of the want of jurisdiction in such cases is not to dismiss the writ of error but to reverse the judgment for want of jurisdiction in the court which rendered it.

Judgment reversed.

# COUNTY OF COBB vs. ADAMS.

- 1. That a claim for damages is presented to the ordinary within twelve months after it accrues or becomes payable, to be audited by him, and its payment is refused, is sufficient to allow the claim to be sued in the superior court. It makes no difference that a trial of the merits of the claim is not had before the ordinary.
- The court of ordinary has not exclusive jurisdiction of damage cases against a county, so as to prevent suit in the superior court to determine the liability, after refusal by the ordinary to approve the claim.

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County of Cobb 21. Adams.

Ordinary. County Matters. Courts. Jurisdiction. Actions. Damages. Before Judge Brown. Cobb Superior Court. March Term, 1881.

Reported in the decision.

PHILLIPS & SESSIONS; GEO. F. GOBER, for plaintiff in error.

A. S. CLAY; R. WINN, for defendant.

SPEER, Justice.

Adams brought suit against the county of Cobb to recover damages for personal injuries which he alleged he had sustained by the falling of a bridge, which he was crossing, and which, the county had, through negligence, failed to keep in proper condition and repair.

On the trial in the court below, under the evidence and charge of the court, the jury returned a verdict for the plaintiff for the sum of five hundred dollars. Defendant made a motion for a new trial, on the grounds set forth in the record, which was overruled by the court, and defendant excepted.

1. The main question relied upon by the plaintiff in error in this court for a reversal, was as to the alleged failure of the court to give in charge to the jury a certain request made by the counsel for defendant below, and also as to the charge given by the court to the jury, modifying this request. The defense relied upon in part by the defendant below was that the plaintiff had not fully complied, before he instituted his suit, with section 507 of the revised Code, which requires "that all claims against the county must be presented to the ordinary within twelve months after they accrue or become payable, or the same are barred," etc. And further, that section 506 of the Code makes it the duty of the ordinaries to audit all claims against their respective counties, etc.

### County of Cobb vs. Adams.

Counsel for defendant below requested the court to charge, "before the plaintiff can maintain this action, his claim must have been presented for auditing. The word 'audit' has a technical meaning, which is to audit, to ex amine, to pass upon."

It is complained that to this request given the court added the following: "Yes, gentlemen of the jury, that is the law. It has been so decided by the supreme court, and I charge you, that is the law applicable to this case. But I will read to you section 507 of our Code, which our supreme court was construing when they made the decision referred to," and after reading said section the court remarked, "that it might be seen that the section which requires the party to present the claim in twelve months does not use the word 'audit, or to be audited,' but the supreme court says that is the meaning of it, and it must be presented to the ordinary for that purpose, but the party presenting it need not use the word 'audit,' but it is sufficient if he presents it for that purpose, and the ordinary examines it and refuses to allow it, that is, refuses to audit it and approve it but rejects and disallows If the plaintiff has shown that he has done this, then he has a right to sue in this court, and if he has made out his case in other respects, he is entitled to recover such damages as he has shown by proof that he sustained. The ordinary is not bound to go into a trial of the case and introduce witnesses before him before the plaintiff can sue. But if the claim is presented and he examines it and refuses it, that is all that is required to enable plaintiff to bring his suit." We see no error in this charge of the court as given, under the facts of the case. See Maddox vs. County of Randolph, decided at February term 1880, pamphlet, page 37.

2. As to the other ground insisted upon by counsel for plaintiff in error, in the argument, but not contained in the record, "that the court of ordinary had exclusive jurisdiction to audit and adjudicate claims against the

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county, and that suit by petition should have been instituted there, and that the superior court had no jurisdiction of this kind of claim, save only by appeal from the decision of the ordinary, we can only say that this question was held otherwise by this court in this case of Fred Cox vs. The Commissioners of Whitfield County, decided at the September term, 1880, pamphlet, page 27.

Let the judgment of the court below be affirmed.

# GOW et al. vs. THE CHARLOTTE, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

- Though books be produced under notice, unless their contents are applicable and relevant to the question in issue, they are not to be used in evidence.
- When the court is requested to deliver a written charge, he should do so; and it is not good practice to direct counsel to read his own requests to the jury.
- (a.) It appearing that the writing of the requests in this case was not very legible, and no complaint being made of the manner in which they were read, the charge of the court being correct, and the verdict supported by the evidence, a new trial will not be granted.
- (b.) The main points of this case are covered by the ruling in 59 Ga., 685.

Principal and Surety. Evidence. Practice in Superior Court. Charge of Court. Before Judge SNEAD. Richmond Superior Court. October Term, 1880.

Reported in the decision.

JNO. T. SHEWMAKE, by brief, for plaintiffs in error.

FOSTER & LAMAR, by brief, for defendant.

CRAWFORD, Justice.

Suit was brought by the Charlotte, Columbia and Augusta Railroad Company against R. H. Willy and his se-

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curities, on a bond executed by them for the said Willy's faithful performance and discharge of all the duties of agent of the said corporation. Among these were that he should require the freights and fares to be paid in cash, and to account therefor by making daily payments thereof to the treasurer of the corporation.

For his failure to comply with the terms of this bond in collecting, as well as in failing and refusint to pay over the money he received as agent, as aforesaid, he and his securities were sued. Upon the first trial the jury found for Gow, the security, but against Willy for the amount of his bond.

Upon a review of the case by this court, which is reported in 59 Ga., 685, the judgment was reversed and a new trial ordered, and this writ of error arises from that trial.

The facts, as well as the law applicable thereto, were fully reported and ruled upon in the case when first before this court, and a close examination of this record will show that the law, as then laid down, has been strictly pursued by the judge. There is really no material change of the facts shown in the brief of evidence, and the case, in all its essential elements, is ruled by the former decision.

There are some new matters springing up in the last trial which, however, need to be passed upon.

r. It is complained that a rule-book of the company having been produced under notice, was excluded from the consideration of the jury. The judge admitted it upon condition that it was to be identified as containing rules for the government of the defendant, Willy, during his agency. The testimony not showing that fact, the book was properly ruled out. Indeed, the proof is altogether the other way, as may be seen in Palmer's and Van Buren's testimony; and Gibbs, upon whom special reliance is placed, says that he does not know. Books, though produced under notice, unless their contents are appli-

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cable and relevant to the question in issue, are not to be used as evidence.

2. Objection is made to the fact that the judge did not read to the jury the charges requested by the plaintiff's counsel, but directed that the attorney himself read them to the jury, and this after he had been requested to deliver his charge in writing. We think that the better practice would be, in such cases, for the judge himself to read the requests to charge, especially as the power to emphasize and impress the particular points in the case thus charged on the minds of the jury, is so tempting as scarcely to be resisted, and if done would be error. In this case, however, the writing was not very legible, and no complaint is made of the manner of its reading.

The judge having almost literally followed the law as ruled by this court, the verdict being amply supported by the testimony, and no error having been committed which would change it upon another trial, the same must stand.

Judgment affirmed.

## BLAISDELL et al. vs. BOHR et al.

- I. If scrip representing railroad stock be stolen, the name of the true owner forged, and the stock sold and transferred on the books of the company, a bill will lie to compel the issue to her of new stock and the accounting for dividends by the company, or in default thereof to compel the purchasers to replace the stock. Such a bill is not demurrable for want of equity.
- 2. A bill is not multifarious because all of the defendants are not interested in all of the matters contained in the suit. It is sufficient if each party has an interst in some matter in the suit which is common to all, and that they are connected with the others.
- 3. All persons who are directly or consequentially interested in the event of the suit are properly made parties to a bill in equity, so as to prevent a multiplicity of suits by or against parties at once or successively affected by the original case.
- 4. An allegation that stock was purloined or stolen, as complainant

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believed, by a certain person, and afterwards used by him without her knowledge or consent, was equivalent to a charge of want of authority on the part of such person to represent complainant.

- 5. A bill being brought to recover stock fraudulently sold to several purchasers, the complainant could amend by striking the names of several of them, waiving her right to call on them to respond to her for the amount of stock held by them.
- 6. There was no error in ordering the person who fraudulently sold the stock to be made a party to the bill for its recovery.

Equity. Stock. Parties. Amendments. Pleadings. Before Judge SNEAD. Richmond Superior Court. October Term, 1880.

Reported in the decision.

FRANK H. MILLER; W. K. MILLER, for plaintiffs in errror.

M. P. CARROLL; J. B. CUMMING, for defendants.

CRAWFORD, Justice.

Christine Bohr filed her original bill against the Georgia Railroad and Banking Company, Frank Blaisdell, Abram H. McLaws, Andrew J. Miller, Charles Z. McCord, Lewis F. McCord, John J. Cohen, John J. Cohen & Sons and Henry Blum, alleging substantially, that she was the owner of twenty-three shares of stock of the Georgia Railroad and Banking Company, and that it had been purloined or stolen from her, as she believed, by Oscar R. Hummell. That her name had been forged to a power of attorney on the back of the scrip, as she believed, by the said Hummell. That the first forgery was witnessed by Frank Blaisdell, as a notary public, under his official seal, and five of the shares of said stock were sold and transferred on the company's books to Lewis F. McCord, Charles Z. McCord, and John J. Cohen & Sons. That the second forgery was witnessed by Andrew J. Miller, and by A. H. McLaws, as notary public and ex officio justice of the peace

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for Richmond county, and six shares of the said stock transferred to Andrew J. Miller on the books of the company. That the third forgery of her name was witnessed by Frank Blaisdell, as a notary public, under his official seal, and the remaining twelve shares transferred on the books of the company to John J. Cohen and Henry Blum.

The prayer of the bill was that the Georgia Railroad and Banking Company replace her name on its books as the owner of the said twenty-three shares of stock, issue to her new certificates, and pay her the accrued dividends; or that it pay to her the highest proved value thereof since the transfer was made.

Her further prayer was, that should the said company be unable to perform and comply with the terms of the decree prayed for against it, then, that the other defendants be compelled to replace the stock.

The Georgia Railroad and Banking Company filed its answer admitting the charges in the bill so far as its own acts were concerned, but denied all knowledge, information or belief as to the purloining or stealing of the first certificate. or that the certificates for the eighteen and then the twelve shares ever went into complainant's possession, or that her name was forged to the power of attorney. That by its charter and by-laws transfers are made by the shareholders in person, and by attorneys in fact, specially authorized. When by the latter, the authority must be attested by a notary public or a judicial officer, thereby securing the guaranty of the official oath of such officer that the power of attorney is genuine. And this defendant further denied that it was a guarantor of the genuineness of the power of attorney further than such diligence as the circumstances required. And when such diligence was used, it denied all liability to the original or purchasing shareholder.

This defendant by way of cross-bill, charged, that at the times when the power of attorney bore date, Blaisdell and McLaws were notaries public for Richmond county, and that it had the right to give full faith and credit to their

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official acts, and that they attested the same on seeing the complainant sign and seal them. And if this were not so, that their attestation was a breach of official duty by which it was misled, and that its co defendants should be decreed to make good, respectively, any loss it might sustain by their respective breaches of official duty.

And further, by way of cross-bill, that its co-defendant, A. J. Miller, attested one of the powers of attorney, although he did not see complainant sign and seal the same, whereby he misled defendant. That the said Miller acted as attorney under one other of the powers, although he had actual knowledge that complainant had not signed and sealed said power in the presence of any witness, under which last named power the said Miller transferred twelve of the said shares, and that he should be decreed to make good any loss which the defendant might sustain on account of the said six and twelve shares.

The defendants, Miller, Blaisdell and McLaws, filed their demurrer to the bill of complaint, and to the cross-bill of their co-defendant, the Georgia Railroad and Banking Company. The complainant amended her bill by striking out the names of the defendants not served.

The demurrer to the original bill was for want of equity, because there was an adequate remedy at law, that the bill was multifarious because of a misjoinder of parties defendant, and a want of proper parties.

The same demurrer was filed to the cross-bill of the Georgia Railroad and Banking Company, adding thereto that there was a misjoinder of the grounds of relief and of actions.

Amendments to these demurrers were filed; first to the original bill, a more specific demurrer on the ground of misjoinder, and in holding Miller as a purchaser for eighteen shares, and leaving out other purchasers; to the cross-bill, that this defendant is no guarantor of stock, to subject its liability without relief as against purchasers, and that all these must be made parties defend-

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ant before the case can proceed. The demurrer to the original and cross-bill was further amended, upon the ground that no allegation was made that criminal proceedings had been commenced against Hummell, and that there was no sufficient allegation that Hummell never had any authority to represent complainant in regard to the stock.

The chancellor, after argument had, overruled the demurrers, and ordered Hummell to be made a party to the original bill.

To this judgment counsel for Blaisdell, McLaws and Mitchell except, and bring the questions here for adjudication.

1. First, then, was there equity in the bill? In all cases of fraud equity has concurrent jurisdiction with courts of law, and where courts of law cannot give complete and effectual relief, a court of equity will.

Whether the railroad company is liable or not to the complainant for this stock, it is the party holding the control and power over the whole capital stock and its dividends, and equity alone can afford the full measure of relief to the complainant as against all the parties and over the subject matter. A court of law, without a multiplicity of suits, could afford no thorough adjudication of all the matters involved in this bill. Not only are the shares themselves involved, but the dividends are to be paid only to the true owner, and if misapplied they are to be accounted for.

If complainant has not lost her right to have restored to her the possession of the certificates of this stock, then those which have been issued to other parties are to be delivered up and cancelled, and new ones given to her. This she could not have done in a court of law.

2. Is the bill multifarious?

It is claimed that it is, because several distinct and independent matters are joined by one complainant against several defendants.

"To sustain a bill against multifariousness it is not indis-

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pensable that all the parties should have an interest in all the matter contained in the suit. It is sufficient if each party has an interest in some matter in the suit which is common to all, and that they are connected with the others." 8 Ga, 236, and authorities there cited.

There was in this whole transaction but a single subject matter—the twenty-three shares of stock. How and where the liability will fall, and what shall be the final determination as to the rights of these parties, are not the questions. All the parties are connected with it in the conveyance from the alleged true owner. They may all be heard, and their rights and liabilities settled in this one suit, and the whole matter finally adjudicated. 21 Ga, 6; 35 Ib., 208. Mitford & Tyler 271-3. Dan. Ch. Pl. and Pr., 334; Story's Equity Pl., 271, 271, a.

Courts discourage the objection of multifariousness in all cases where, instead of advancing, it would defeat the ends of justice. 12 Ga., 61, 1-2-3 of the opinion.

3. Was there a misjoinder of parties defendant to the original bill, or want of proper parties? Or was there a misjoinder of parties and grounds of relief or of action to authorize the prayer in the cross-bill? All persons who are directly or consequentially interested in the event of the suit should be made parties.

Persons are often necessary parties defendant to a suit, "not because their rights may be directly affected by the decree if obtained, but because in the event of the plaintiff succeeding in his object against the principal defendant, that defendant will thereby acquire a right to call upon him, either to reimburse him the whole or part of plaintiff's demand, or to do some act towards re-instating the defendant in the situation he would have been in but for the success of the plaintiff's claim." This is done to avoid a multiplicity of suits, and requires the parties who may thus be consequentially liable to be brought, in the first instance, before the courts, that all the liabilities may be adjudicated and settled in one proceeding. I Dan. Ch. Pl., and Pr. §283.

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One further ground of demurrer both to the original and cross-bill was, that it was not averred that any criminal proceedings had been taken against Hummell, but the same was not insisted on in the argument before us.

- 4. Another was, that no sufficient allegation was made that Hummell never had any authority to represent the complainant in the premises respecting the stock. We hold that the allegations charging that the same was purloined or stolen, as complainant believed, by him and afterwards used by him without her knowledge or consent, was quite sufficient.
- 5. The right of complainant to amend the original bill by striking out those defendants not served, was one which she had the right to exercise, if she chose to waive her right to call on them to respond to her for the amount of stock held by them.
- 6. To order that Hummell be made a party was not error; nor was it error to order it done by publication, because no process had theretofore issued to test the question of his residence.

In ruling the questions made by the first ground of demurrer to the original bill, that it was without equity, we pronounce no judgment on the right of the parties, as they would be affected by the fact of whether there was or was not some one present at the time of the attestation purporting to be the complainant, as it is not charged therein. And we rule upon the cross-bill, not because the exceptions are of right properly here at this time, but because the demurrers to the original bill, which are properly here, are also made in, and must control the cross-bill.

Judgment affirmed.

Dunn vs. Brogden.

### DUNN vs. BROGDEN.

Where the plaintiff in an execution more than seven years old has had it regularly revived as being dormant, so long as the judgment of revival is unreversed, having been rendered by a court of competent jurisdiction, the fact of dormancy is res adjudicata, and is not open to question on a claim case arising under the revived judgment.

Judgments. Res Adjudicata. Claims. Before Judge UNDERWOOD. Gordon Superior Court. February Term, 1881.

Reported in the decision.

T. C. MILNER; W. K. MOORE, for plaintiff in error.

JAS. McConnell; Bray & Gray, for defendant.

JACKSON, Chief Justice.

A dormant judgment was revived in a justice court and execution issued thereon was levied, and claim interposed. Objection was made to the fi. fa. on the trial of the claim case on the ground that the original judgment, which was revived, was not dormant, and therefore illegally revived. The court rejected the fi. fa., ruling that the revived judgment was illegal, and error is assigned on that ruling.

In 57 Ga., 609, it is ruled that "where the plaintiff in a judgment more than seven years old has had it revived by scire facias, as having become dormant, it is a lien on defendant's property from the date of revival only, and so long as the judgment of revival is unreversed, the same having been rendered by the court having jurisdiction, the fact that the original judgment was dormant, whether true or false, is res adjudicata, and is not open to question on a motion to distribute money arising from the sale of defendant's property. 9 Ga., 117; 10 Ib., 371; 13 Ib., 223."

Garrison et al. vs. The City of Atlanta.

The principle thus announced rules the case made in this record adversely to the judgment of the court below.

True, that was a contest for money: this is a claim case; but that difference can make no distinction in the application of the principle to the facts. In the one case, as in the other, it was a contest between the judgment creditor and a stranger.

True, too, that was a judgment of the superior court, this of the justice court; but the jurisdiction of the justice court appears on the face of the record of the revived judgment, both of the subject matter and of the person—of the subject matter, as the amount of the judgment and the grant of the original judgment are within the jurisdiction of that justice court, and of the person, as defendant was served with the scire facias.

Judgment reversed.

GARRISON et al. vs. THE CITY OF ATLANTA.

Injunction will not be granted to restrain a criminal proceeding.

Injunction. Equity. Criminal Law. Before Judge HILLYER. Fulton County. At Chambers. July 16th, 1881.

Reported in the decision.

L. J. GARTRELL; WRIGHT & DORSEY; A. B. CULBERSON, for plaintiffs in error.

W. T. NEWMAN, for defendant.

CRAWFORD, Justice.

The city of Atlanta adopted an ordinance which declared that no cattle of any kind should be allowed to run at large upon the streets. For the enforcement of this ordinance a penalty, by fine or imprisonment, was

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provided against the owner, upon conviction, for a violation thereof.

The plaintiffs in error filed their bill in equity, asking an injunction against the city prohibiting her from the enforcement of this ordinance. The chancellor held that injunction did not lie to restrain proceedings in a criminal matter. In this judgment he followed the ruling made by this court in the case of *Phillips et al.*, vs. The Mayor, etc., of Stone Mountain, 61 Ga., 386; and therefore committed no error.

Judgment affirmed.

## TUMLIN vs. O'BRYAN & BROTHERS.

- 1. Affidavit of illegality is not the proper remedy to arrest an execution and set aside a judgment, upon the ground that at the time of its rendition by the court, as being by default, there was an issuable plea of file and undisposed of. Such a result can be obtained by writ of error, motion to vacate the judgment, or bill in equity, as the facts of the case may demand.
- This case having been apparently brought up for delay only, damages are awarded.

Judgments. Illegality. Before Judge FAIN. Bartow Superior Court. January Term, 1881.

Reported in the decision.

M. R. STANSELL, for plaintiff in error.

AKIN & AKIN, for defendants.

# CRAWFORD, Justice.

1. The only question made by the bill of exceptions in this case is, whether an affidavit of illegality is the proper remedy to arrest an execution and set aside a judgment, upon the ground that at the time of its rendition by the court there was a plea of file and undisposed of.

### Cowan vs. Corbett et al.

The defendant shows that he was in court with a defense; if, therefore, the court rendered an illegal judgment against him, over his defense, his remedy was by writ of error.

If the judgment was rendered against him by fraud, accident or mistake, or the acts of the adverse party, unmixed with negligence on his part, his remedy was by motion to vacate the judgment, or bill in equity for relief. That an affidavit of illegality is not the proper remedy in such a case is too manifest for doubt. Code, §§3671, 3595; 63 Ga., 510; 64 Ga., 565.

2. The defendant in error insists upon damages as his clear legal right in this case; and this court being of opinion that the same could have been brought up by the defendant for delay only, the judgment is affirmed, with ten per cent. damages thereon.

Judgment affirmed.

# COWAN vs. CORBETT et al.

- I. Where appraisers set apart property as a year's support for the family of a decedent, and their return is admitted to record, after the lapse of six months, the title vests in the family. A formal judgment of a court of ordinary is only necessary where the appraisers set apart a sum of money.
- (a.) That the return was admitted to record before the end of six months did not render it invalid. The right of exception continued until the time expired, and the record then became operative.
- Parol evidence of those within whose knowledge the matter falls is admissible to show that there has been no administration on an estate.

Year's Support, Title. Record. Ordinary. Evidence. Before Judge CRISP. Stewart Superior Court. April Term, 1881.

Reported in the decision.

W. H. HARRISON & BRO.; T. D. HIGHTOWER; W. A. LITTLE, for plaintiff in error.

### Cowan vs. Corbett et al.

J. L. WIMBERLY; JNO. T. CLARKE; E. H. BEALL, for defendants.

SPEER, Justice.

A fi. fa., controlled by Cowan as transferee, against Jas. L. Corbett, defendant, was levied on three hundred acres of land, being lot 115 and east half of lot 94, in twenty-second district Stewart county, as the property of defendant, to which defendant in error, as agent for Wallace Corbett, John Corbett, W. J. and C. Corbett, Almira Hawkins, and Jane Alderman, interposed his claim. On the trial plaintiff introduced his fi. fa., proved possession by defendant in fi. fa., since the judgment, and closed.

Claimant introduced evidence from the records of the court of ordinary of Stewart county, that on the petition of Susan A. Corbett, widow of defendant in fi. fa., the lands levied on had been set apart as a twelve months' support for the widow and her minor children, by commissioners duly appointed for that purpose. Claimant further proved the death of the widow, and that the claimants were her heirs at law. Under the evidence, and charge of the court, the jury found the property not subject. During the trial, claimants offered in evidence extracts of records from the minutes and book of appraisements of the court of ordinary of Stewart county, consisting of a petition, filed by Susan A. Corbett, to the ordinary of said county, setting forth that she was the widow of Jas. L. Corbett, deceased, and asking that a twelve months' support be set apart out of the property of her deceased husband, for herself and her minor children.

Also the order of the ordinary appointing, in conformity with said petition, five appraisers to set apart and assign to said widow and minor children, either in property or money, a sufficiency from said estate for their support and maintenance for twelve months from death of deceased.

Also the return of the appraisers appointed, reporting

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that they had set apart a twelve months' support, certain described property, which includes the land levied on, valued at (including personalty) \$1,170.00, and furniture valued at \$110.50; which appraisement was made and filed in office on 25th September, 1869, and recorded 1st October, 1869. To the introduction of these records, the plaintiff objected, which was overruled, and plaintiff excepted and assigns error thereon.

R. F. Watts was sworn as a witness for claimants, who testifies "that he was the ordinary of Stewart county in 1869, and before, and there never had been any legal representative of the estate of James L. Corbett." To the admission of this evidence plaintiff objected, which was overruled by the court, and plaintiff excepted.

Claimants proved by J. B. Latimer, ordinary of Stewart county, that there never had been, within the knowledge of witness, any legal representation on the estate of Jas. L. Corbett, which evidence was objected to by plaintiff's counsel, and objection being overruled, plaintiff excepted.

The court charged the jury, "If such proceedings were had as is claimed to have been shown by the records of the court of ordinary, that appraisers were appointed, that they made a return, and such return was admitted to record by the ordinary, then such return, without any judgment of the ordinary thereon, operated so as to vest the title of the property set apart in said widow and minor children, and that, too, if the ordinary admitted the return to record before or after the expiration of six months from the date of the return." To which charge the plaintiff in error excepted, and assigns the same as error.

The main questions insisted upon by counsel for plaintiff in error, before this court, were:

- (1.) There being no judgment of approval rendered by the ordinary on the return of the appraisers, no title vested in the applicants.
- (2.) Error in the admission of the evidence of Watts and Latimer.
  - (3.) The charge of the court as to the legal effect of the

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applicants' order, and return of the appraisers, as to vesting title in the applicants to the property set apart.

1. Under the act of 1856, it is admitted, as construed by this court in 30 Ga., 539, that no judgment was necessary; that if the return of the appraisers was made, and not objected to, within six months, it passed to record, and the work was done. But it is insisted that, by the act of 19th December, 1860, the act of 1856 was amended, to the effect of requiring a judgment.

The act of 1856 simply directs the report to be recorded by the ordinary. This is a mere ministerial act, to preserve the evidence and show upon the books of the ordinary's office the manner in which so much of the estate is disposed of. If this report is met with objections, filed as provided for, by persons interested, then the judgment of the ordinary is invoked, and from that judgment an appeal can be had. Where there are no exceptions filed, this court held there can be no appeal simply from the report of the commissioners. 30 Ga., 539. In what particular has this been changed by the amended act of 19th December, 1860? That act simply authorizes "the court of ordinary to issue executions in favor of widows and minors for the twelve months' support allowed them by appraisers appointed for that purpose." The act declares, when the return of the appraisers is made setting apart a sum of money, and the same made the judgment of the court, "the ordinary may issue a fi. fa. in favor of the applicant, against the representative to be levied upon the estate of the testator, or intestate, in the hands of the representative." It is only in case of a return by the appraisers of a sum of money this judgment of the ordinary is demanded, and this for the purpose of having a fi. fa. to enforce its collection.

In the case now under consideration, there was no such return of a sum of money, and as there were no objections filed, we do not see any need for a judgment by the ordinary to vest this title, save to enter the return upon the records.

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Perry, administrator, vs. Wall.

That the record was made prematurely, we do not think affects its validity. The statute gave the six months period in which to file the exceptions, and these could have been filed, notwithstanding the entry of the return on the record; and if none were filed within the six months, then, at the end of that period, the record entered made the title complete.

2. Neither do we think the court erred in admitting the testimony of Watts and Latimer. The petition to the ordinary recited the fact that there was no representation on the estate, and likely to be none. This, it is to be presumed, was prima facie true from the record, and was not then controverted. Yet, to supply this proof, out of caution, the testimony of Watts and Latimer was offered and allowed. We know of no better mode of proving what is not on record than to prove this negative by those who were, and are, keepers of the records, and who are presumed to be familiar with their contents. The record would not affirmatively prove what was not on it, and we think the parol proof competent for that purpose. Under our views of the law, thus expressed, it may be inferred that we see no error in the charge of the court complained of.

Let the judgment of the court below be affirmed.

# PERRY, administrator, vs. WALL.

That a tenant is ousted from lawful possession of property is not alone sufficient to make the landlord responsible; it must further appear that the tenant dissented, and that the ouster occurred through the landlord, or by his consent.

Landlord and Tenant. Ouster. Before Judge FLEM-ING. Early Superior Court. April Term, 1881.

Reported in the decision.

BUSH & LYON, by brief, for plaintiff in error.

Perry, administrator, vs. Wall.

R. H. POWELL; KENNON & HOOD; GUERRY & PARKS, for defendant.

SPEER, Justice.

This was a motion for a new trial, made by the defendant in the court below on the following grounds:

- (I.) Because the court erred in refusing to allow defendant to put in evidence before the jury the fact that at the time of issuing said warrant the plaintiff was not the landlord of defendant, the court holding that the defendant might show any facts going to show that the note sued on was not given for rent, but could not show that plaintiff was not landlord of defendant. The court adds this note to this alleged ground of error: The question was asked witness, "If plaintiff owned any land," which the court rejected, counsel for plaintiff stating he wished to show plaintiff was not landlord of defendant.
- (2.) Because the court erred in saying, during the progress of the trial, in presence of the jury, that defendant had not made it sufficiently clear that Wall, plaintiff, had any thing to do with the ouster of defendant. The court adds to this ground, the following: "The expression used was, that Wall must be shown to be connected with dispossessing defendant."
- (3.) Because the court erred in his entire charge to the jury. The only part of the charge specifically excepted to as error is as follows: "But I charge you that no party, or his agent, could take possession of what he has rented, so as to defeat the claim for rent, unless it is in proof before you that, with power, he deprived the party to whom rented, and that he dissented to it. If it should appear to you this party took possession of the property by force, and without the consent of the other party, then this rent would not be due. If, after going into the possession of the property the other party comes and takes possession, and he quietly consents to it, he would not be decharged the rent."

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The evidence in the case showed the warrant was sued out on a promissory note, signed by Thomas J. Bush (the intestate of plaintiff in error), given to W. G. Wall, for one bale of middling cotton, weighing five hundred pounds, dated 10th December, 1875, and due 15th November, 1876—given for rent. That cotton was worth, when the note fell due, eleven cents per pound. That note was given for rent of part of the old James Bush plantation and one-half interest in use of gin, gin-house and screw for the year 1875.

Stovall testified he heard trade between Wall and Bridges about gin, gin-house and screw. Wall, plaintiff, owned half interest in the gin, etc., and Bridges owned the other half. Wall sold his interest to Bridges, about 1st October, 1875. Wall told Bridges to take possession of gin. etc., and do what he pleased with it. Bridges had rented his half of gin to one Wilson. Bridges went down and took entire possession of his gin, gin-house and screw, through Wilson, and excluded Bush from use of same, and would not let Bush put his cotton in gin-house. Bush was dewied use of gin from time of sale from Wall to Bridges. thhe use was valuable. That, to the sale, Bush had use of of 1 one week and Wilson the next. The rent of gin, etc., 18 worth three or four hundred dollars. That defendant damaged at least fifty-five dollars by being refused the

The court, in its charge to the jury, left the questions to them whether the tenant had been deprived by a landlord of the use of the gin and gin-house against consent. He in terms instructed them, if the landred, either by himself or agent, has, against the assent of ING tenant, deprived him of the use of the property rented,

of the gin privileges, etc.

he could not recover. It is not pretended that the Rep d personally deprived the tenant of the use of the BUSH, but if he was deprived of it at all, against his as-

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sent, it was by one Wilson, to whom Bridges, the other joint owner in the property, had rented his half interest. The jury, in the absence of all proof that Wall, the landlord, had any personal agency in ousting Bush, might have laid the ouster at the door of Wilson. We think if a tenant suffers a third party to come in and oust him, unless he can show he dissented therefrom, and that the landlord procured the ouster, or was in some manner responsible for it, then an ouster, under such circumstances, would not defeat the landlord's right to recover his rent. We think this principle was fairly given in charge by the court, and as there was evidence to support the verdict, and the judge below was satisfied therewith, we see no error that will, in our opinion, necessitate a new trial, under the rules so often laid down by this court.

Let the judgment below be affirmed.

## SPENCER vs. FULLER & DOOLITTLE.

A constable being still in office, and parties being protected by his official bond, he may on the day of sale under a levy by him amend his official entries so as to make them conform to the facts, without any order for that purpose.

Officers. Constables. Levy and Sale. Before Judge POTTLE. Fulton Superior Court. September Term, 1880.

Reported in the decision.

S. A. DARNELL; GEO. S. THOMAS, for plaintiff in error.

M. A. BELL, for defendants.

# CRAWFORD, Justice.

The single question made by this bill of exceptions is whether a bailiff who has levied a justice's court fi. fa. upon real estate, may on the day of sale, and before the sale, and whilst he was still in office, amend his official

entries so as to make them conform to the facts of the case at the time of such entries. [The amended entry was one of "no personalty."] By §3497 of the Code it appears to us that ample power is given to authorize such amendments. But it is insisted that the entry was a nunc pro tunc entry, and therefore needed an order of the court before the same was allowable.

As early as the case of Hopkins vs. Burch, 3 Kelly, 225, it was held by this court that "so long as the sheriff is in office, and parties are protected by his official bond, he may amend his return. This reasoning applies, (says the judge) to constables, for they also give bond." Again it was held in the case of Jessup vs. Gragg, 12 Ga., 263, that a constable while in office may amend his return, because he makes his entries subject to his liability for a false return. Because authority is given to the sheriff, or other executing officer failing to make an official return which he should have made, nunc pro tunc by order of the court, it does not follow that such officer, whilst he is still in office, must obtain such an order to authorize him to make such entries and returns as conform to the facts of the case at the time such entry or return was made.

Neither does such an entry as the one made in this case cause the levy itself to fall by reason thereof.

Judgment affirmed.

## SIMON vs. MYERS & MARCUS.

- I. Where the names of counsel are marked on the docket for a defendant, it has been the practice of the superior courts to enter the case as answered on the call of the appearance docket. When there is no such call, the marking of the names of counsel alone at the first term is sufficient, and the general issue will be considered as filed.
- (a.) The plea of the general issue being thus in, it may be subsequently amended by adding a plea of set-off.
- 2. No formal notice by the defendant to the plaintiff of the filing of a plea of set-off is necessary. When filed, it must substantially set forth the claim of the defendant, so as to be itself notice thereof.

(a) If the plaintiff be taken by surprise by the filing of the plea of setoff, or has had no notice of it, he will be granted a continuance, and costs or proper terms imposed on the defendant.

3. After the filing of a plea of set-off, the plaintiff cannot dismiss his

action so as to defeat such plea.

4. Under a plea of set-off the plaintiff cannot defeat the recovery of the defendant by failing or refusing entirely to prove his own claim. The defendant may nevertheless prove his demand and ercover against the plaintiff.

5. That a defendant has previously sued the plaintiff in the present suit, and that his suit was pending at the time of the bringing of this, will not prevent defendant from dismissing such action and then pleading his demand as a set-off to the action of the plaintiff.

Practice in Superior Court. Pleadings. Set off. Continuance. Before Judge POTTLE. Richmond Superior Court. October Term, 1880.

To the report contained in the decision it is only necessary to add that the following were among the assignments of error in this case:

(1.) Because the court, when the case was called for trial and plaintiff's attorney moved to dismiss his case, on objection of defendants' attorney, refused to permit it to be done because of defendants having filed, February 10th, 1879, their plea of set-off. Plaintiff's attorney stated in his place, and the truth of the statement was not controverted, that he had no knowledge of the existence and filing of said plea until then, and had never been notified thereof by defendants' attorneys. It appeared, however, from the record that said plea of set-off was filed at the same time with the plea of the general issue, and the entire claim of plaintiff denied by both pleas.

(2.) Because the plaintiff, under the rulings of the court, was forced to proceed to trial upon the merits of said plea of set-off, it being a separate and distinct cause of action, but upon the understanding between counsel in open court, and with the leave of the court when defendants' attorney was about to address the jury, that in the

event of a finding in favor of defendants against the entire claims of plaintiff, and sustaining the whole amount of set-off, that the verdict should be construed by the court just as if the court was then moved to dismiss the plea of set-off of defendants, and requested to charge the jury that if all of plaintiff's claim was disallowed by the jury there could be no finding for defendants on the plea.

- (3.) Because the verdict in favor of defendants against the whole amount of plaintiff's demand, and then also rendered in their favor for the entire amount of the account pleaded as a set-off, is one not authorized by the laws of this state, and rules of pleading and practice thereon; and if valid at all, it is only as against plaintiff's demand.
- (4.) Because the verdict as rendered is contrary to law, and void.
- (5.) Because this case, as shown by the court docket, was never answered to at the appearance term, and nothing was done by defendants' attorney except to mark their names as counsel for defendants.
- (6.) Because the matter involved in the plea of set-off, as shown on the trial by the testimony of W. T. Davidson, was involved in a separate suit in another court against plaintiff, and the same was dismissed after the appearance term of this court, and then filed as a set-off in this case by defendants, so that it did not exist as to this suit when filed.
- (7.) Because the court, in overruling the motion for new trial, held that a suit pending in another court in favor of Myers & Marcus against Nathan Simon at the commencement of this suit could be dismissed afterwards, and the matter pleaded as a set-off at the second term of this case, without notice, other than the marking of the plea "filed" by the clerk.

FRANK H. MILLER, for plaintiff in error.

J. S. & W. T. DAVIDSON, for defendants.

JACKSON, Chief Justice.

The plaintiff in error sued the defendants in error for \$2,150.00. Defendants pleaded a set-off for \$687.86. The jury found against the entire claim of plaintiff and for the entire claim of defendant, and judgment was entered accordingly. A motion was made to arrest this judgment and for a new trial, and error is assigned on the denial of both motions by the court. The grounds on which these motions are based may be reduced from the number contained in them to comparatively few, and thus analyzing and reducing them, we shall consider them as they arise in order of time.

1. The set-off was filed at the adjourned trial term of the court, and not at the first term, but the names of counsel were marked on the docket in defence of the suit at the first term, though answer was not marked by the judge opposite the case. Was this equivalent to filing a plea of the general issue at the first term?

Section 3458 of the Code declares that this plea shall be considered as filed in all cases which are answered to at the first term. The marking or entry of the names of defendants' counsel, we think, is equivalent to answering to the cause. When and where the practice has been to call the appearance docket, whenever the judge saw the names of counsel marked for defendants, he would mark "answer," and this has always been the practice in this state. So it has always been held the equivalent of answer or actually the answer to the case where it has not been the practice to call the docket. It cannot alter the rule that the judge did not call the appearance docket. The obiect is to let plaintiff's counsel know that the case is defended, and when they see counsel marked on the docket, they have that notice given them as well by the marking counsels' names in defense, as in the little word of the judge, "answer." It is the duty of plaintiff's counsel to look at the docket of their cases, and then they have the notice.

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There has been no repeal of this law in words, nor do we think that any thing in the constitution by implication repeals it. Of course, when made out and actually filed, it should be under oath, when required now in certain pleas, but that does not affect the legal effect of answering on the docket. The plea of the general issue thus being in the eye of the law in, it follows that the same may be amended by building on it any other plea at any stage of the cause. Code, §3479. Even a plea of non est factum may be built upon it by amendment. 61 Ga., 233, 245. Any substantial plea may be added. 59 Ga., 160.

2. No actual or formal notice of the plea is necessary. When filed it must set out the particulars of it, so that the plaintiff may have notice when he sees the plea of what items of set-off it contains. Such we understand to be the meaning of Judge McCay in 45 Ga., 164. There was no plea of set-off at all in that case, and hence no notice at all, and no diligence could have ascertained what plaintiff had to rebut. Here the plea was filed.

So, too, we think is the idea of Judge Charlton in T. U. P. Charlton's R., p. 227. The bond, the matter of the set-off, was not set out in any pleading. And such is the Code, §3469, and the statute there codified. Cobb's Digest p. 487.

It is true that this should be done when the answer is filed according to the statute and Code last cited, but the answer may be amended, as we have seen, by additional pleas under later enactments, and then the set-off in full with all the particulars may be pleaded and filed. Of course the court should continue the case if plaintiff is surprised or has not had notice, and put the defendant at costs or impose other terms; and so the judge in the opinion, on the motion for a new trial states that he would have done, but no motion to continue was made.

3. The court was right not to allow plaintiff's action to be dismissed when the defendant had filed a plea of set-off. Code, §2907.

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4. In this state any number of pleas, however contradictory, may be filed; and, if so, why may not plaintiff's whole account be found barred by the statute of limitation, or otherwise illegal, and defendants' set-off be sustained. The set-off is nothing but a cross-action. 8 Ga., 188-9. The plaintiff may dismiss his action, but cannot thereby interfere with the defendants' cross-action, or set-off. Code, §2907. Can he fail, or refuse, to prove his account or offer his promissory note in evidence, and thereby accomplish its defeat? Will the law permit him to do indirectly what he cannot do directly? If he cannot dismiss his action so as to defeat defendant's recovery on the set-off, can he have his claim defeated otherwise and accomplish the same purpose? We think not. Therefore, whatever may be the decisions of courts of other states, or the law elsewhere than in Georgia, in this state the law must be that, though the plaintiff fail to make out any of his claim, and be defeated in it, the defendant may go on and make out his and recover on it.

The court acquires jurisdiction by the suit of plaintiff, and then is required to hold it until justice is done between the parties. To enable defendant to put in his cross-action, the plaintiff must first sue; but after he has done that and the cross-action is filed, the court will not relax its hold on the case until their mutual rights are adjusted according to law; and if it be judicially ascertained by verdict that the plaintiff has failed to show any right to any thing as against defendant, and yet that defendant has proved that he has rights against the plaintiff, judgment will be entered accordingly.

This is the law of this state, and a just law it is. It should not be otherwise. Why, when one sues another, should the latter be forced to bring suit against the former separately, though he may know that the plaintiff's claim is unjust? Why not permit him to institute his claim and say, "I owe you nothing. I have paid all I owe you, but you owe me and I demand that you pay me the

debt?" But be the law just or unjust, politic or unwise, we think that we have shown it to be our law, and it must be enforced.

5. The last point to be considered is, that the defendants had their claim against plaintiff in suit before plaintiff sued them, and at the time plaintiff sued them, and dismissed it afterwards and then filed this plea of set-off; and it is insisted that, as they did not have it in such shape that they could bring their cross-action when they were sued (the claim being already in suit), they could not dismiss afterwards and file the plea in the suit at bar. This point struck my mind with force, when presented, but, on reflection, I do not think it maintainable; and my brethren, I believe, were not much troubled about it at any time. It was certainly a claim, or debt, existing at the commencement of this suit; it was not traded or transferred to anybody else, or pledged, or pawned, or parted with as collateral security, or put beyond the control of the defendants. They had sued it, but no plea of set-off, or other cause, prevented them from dismissing it when they chose to do so. They had the costs of that suit to pay—that is all. That suit was dismissed before this cross-suit was brought. so that the two were not pending at the same time. pose they had been brought as separate suits, it is clear that on the dismissal of the first the second could be brought, and the 2894th and 3476th sections of the Code only apply to the pendency of two suits, for the same . cause of action, at the same time.

In reviewing the whole case, on all the assignments of error, we conclude that the court below has applied the law to the many phases which the complications of fact made for adjudication, without error, and that, too, when new and interesting legal questions had to be solved in the rapidity of motion incident to circuit practice; and the judgment rendered by the presiding judge is approved and affirmed.

Judgment affirmed.

Johnson et al. vs. Holliday, administrator, et al.

JOHNSON et al. vs. HOLLIDAY, administrator, et al.

Equity will never take the administration of an estate out of the hands of an administrator and the court of ordinary, except where it is absolutely necessary to preserve the estate or protect the rights of parties where they would be otherwise endangered; especially not at the instance of heirs as against creditors.

(a.) Where an administrator has been appointed, and after due notice an order to sell realty of the estate has been granted, injunction will not be issued to stop the sale at the instance of the heirs, on the ground that they prefer a division in kind, and that the only debt claimed against the estate (except a small account which they propose to pay) is not legal, there being no allegation of insolvency, fraud or collusion.

Equity. Injunction. Administrators and Executors. Before Judge HILLYER. Fulton County. At Chambers. September 3d, 1881.

Reported in the decision.

McCAY & ABBOTT, for plaintiffs in error.

A. B. & H. L. CULBERSON, for defendants.

CRAWFORD, Justice.

This was an application for an injunction by the heirs of Henry T. Johnson, deceased, to restrain the sale of his real estate by J. S. Holliday, his administrator. The grounds set out in the bill and upon which the injunction is sought are: That the deceased left only a small estate, of the value of some \$2,000.00, and the heirs, being all sui iuris, are anxious to avoid the expense of an administration by dividing the property in kind, and that the administrator, under an order of the court of ordinary, is proceeding to sell for the benefit of the heirs and creditors. That there is no necessity for any administration, as there are no debts of deceased to pay except one of about \$60.00,

Johnson et al. vs. Holliday, administrator, et al.

.part of which has already been paid, and that the heirs at law of the said Johnson have agreed to settle the balance. That John Neal, Jr., at whose instance the administration was had claims to be a creditor of deceased, by reason of his being the holder of two promissory notes made by him to one Irwin, who transferred the same to Neal as collateral security for the payment of a usurious debt. That the consideration moving the transfer being illegal, the title did not pass to Neal. That the notes thus held by Neal against Johnson, not being collectible in the hands of Irwin are not collectible in the hands of Neal. That they would not be collectible in the hands of Irwin, because they were given by Johnson to him for land to which he had no title and to secure which Johnson had to pay more than the amount of the notes. The prayer of the bill was that Neal be restrained from enforcing his claim against the estate, and on final decree that his claim be declared void.

The defendants filed a demurrer for want of equity, which the court sustained and refused the injunction.

To have sustained this injunction would have had the legal effect practically, first to revoke the letters of administration granted by the court of ordinary, and that, too, by a court of equity upon the ground that the heirs-at-law, being sui juris, did not want the expense of an administration upon so small an estate, but preferred to divide the same in kind.

In the second place, the legal effect would have been to set aside the judgment of the court of ordinary, rendered after due and legal notice to all persons interested to appear and show cause why this land should not be sold for the benefit of the heirs and creditors. And this to be done because it is alleged that Neal has notes against the estate which he is not legally entitled to collect.

Equity will never take the administration of an estate out of the hands of an administrator and the court of ordinary, only where it is absolutely necessary to preserve

the estate, or protect the rights of parties where they would be otherwise endangered Indeed, the general principle is, that equity will never interfere with the regular administration of an estate, except upon a strong case clearly made out, especially in favor of the heirs as against creditors.

For these reasons, as well as that there is neither insolvency charged against the administrator, nor fraud or collusion between himself and Neal, his co-defendant, we hold the ruling of the chancellor to be right, and it must, therefore, be affirmed.

Judgment affirmed.

## STILES, administrator, vs. ELLIOTT, executor.

- A rule nisi to foreclose a mortgage is similar to process in an ordinary suit, and may be waived. The petition takes the place of the declaration.
- 2. A judgment foreclosing a mortgage does not fall within the purview of the law making judgments dormant after seven years of inaction.
- Though the bar of the act of 1869 may have been good as a defence to an action, it is not good as a ground of illegality after judgment.
- 4. Twenty years from the date when a mortgage debt is due to the date of issuing a f. fa. on the judgment of foreclosure, is not a bar to the latter. The commencing of the suit on which the fi. fa. is founded within twenty years, suspends the statute.
- (a.) In this case, leaving out the time when the statute of limitations was suspended by law, twenty years had not elapsed even to the date of issuing the ft. fa.

Pleadings. Waiver. Illegality. Statute of Limitations. Executions. Mortgages. Before Judge McCutchen. Bartow Superior Court. July Term, 1880.

Reported in the decision.

A. J. JOHNSON; T. WARREN AKIN; E. D. GRAHAM, for plaintiff in error.

## H. C. CUNNINGHAM, for defendant.

# SPEER, Justice.

On the 8th of April, 1856, W. H. Stiles, Sr., the intestate of the plaintiff in error, executed to Wm. Duncan and W. Mackey, the executors of the will of Mary Ann Couper, his deed of mortgage to a number of lots of land lying in Bartow county, for the purpose of securing the payment of a promissory note, bearing that date, for the sum of \$7,682.50, and due three years from date. W. H. Stiles, Sr., the mortgagor, died in 1866, and Robert M. Stiles qualified as his administrator. On his death, subsequently, W. H. Stiles, plaintiff in error, qualified as administrator de Proceedings to foreclose the mortgage were instituted at the September term, 1871, of Bartow superior court, by petition in the usual form. On the back of this petition there was an acknowledgement of "due and legal service, rule nisi and all further service waived," which was signed by Robert M. Stiles, administrator of Wm. H. Stiles. At the March term, 1872, a rule absolute was granted, foreclosing said mortgage. No further proceedings were had, and no mortgage fi. fa. issued until September, 1879, when a fi. fa. was issued and levied on the mortgaged premises on 31st December, 1879. On the 10th day of January, 1880, plaintiff in error filed an affidavit of illegality to the levy of the mortgage fi. fa., upon the following grounds:

- (1.) That the mortgage upon which the fi. fa. is founded was never legally foreclosed, there having been no rule nisi as required by law.
- (2.) That a period of seven years had elapsed after the pretended order of foreclosure before the issuing of said fi. fa.
- (3.) That the right to foreclose, or cause of action, was barred by the act approved 16th March, 1869.
- (4.) That said fi. fa. issued more than twenty years after the right of action accrued on said mortgage debt.

At the January term, 1880, Stiles, as administrator, also moved to set aside the order foreclosing the mortgage, on the ground that there was "no *rule nisi* as required by law."

At the July term, 1880, it was agreed that the issues made in said illegality and motion to vacate should be submitted as one case to the judge, upon an agreed state of facts (being the facts hereinbefore recited), who, on hearing the same, overruled and dismissed the illegality and motion to set aside the judgment, whereupon defendant below excepted.

1. As to the first ground of error, that there was no rule nisi preceding the foreclosure, it might be sufficient to say that, as this question arose anterior to the judgment, this defense is not the subject matter for illegality, and goes behind the judgment; but as the motion to vacate rests upon the same ground, we will say that the rule nisi was expressly waived by defendant, as appears from the record. The rule nisi is simply in the nature of a process to bring the defendant into court, and if he waives it and accepts service on the petition in lieu, he is bound by it. Code, §3337. The petition is the pleading in the case on part of plaintiff; the order nisi is simply the means of notifying the party of the petition pending. It is true the issue of a rule nisi would give more symmetry to the proceedings, but the waiver of it concludes the defendant-17 Ga., 185.

So the motion to set aside the judgment on the foreclosure, for this cause, comes too late, since the act of 1876 (supplement to Code, §396) requires that "all proceedings of every kind, in every court in this state, to set aside judgments, or decrees of the court, must be made within three years from the rendering of said judgments and decrees." See also 64 Ga., 497.

In this case, the judgment of foreclosure was rendered 5th of March, 1872, and the motion to set aside made 5th February, 1880.

2. The second ground of illegality was that more than seven years had elapsed between the judgment of foreclosure and the issuing of the mortgage fi. fa. thereon, and the fi. fa., therefore, was issued upon a dormant judgment.

In 7 Ga., 495, this court held that "judgments on the foreclosure of mortgages are not within the act of 1823" (the dormant judgment act), which declares null and void all judgments upon which no execution has issued, or, if issued, upon which execution no return has been made within seven years; and that ruling has been steadily adhered to and followed since. 40 Ga., 412; 53 Ib., 328; 49 Ib., 51; 51 Ib., 279; 62 Ib., 725.

3. It was insisted in the third ground of illegality that the cause of action was barred by the act approved 16th March, 1860.

While this may, and probably would have been, a good ground to prevent a recovery, if filed in time, and before the judgment, it cannot be considered, or sustained, in an affidavit of illegality. The judgment rendered is *conclusive* on the estate, and a bar to all defenses which might have been made before its rendition. 54 Ga., 299, 360; 59 Ib., 78.

4. It is further insisted as a ground, "that said fi. fa. issued twenty years after the right of action accrued on said mortgage debt." The commencement of the suit suspended the running of the statute, and this occurred long before the bar of the statute attached. Nor is it true, in point of fact, that the twenty years had elapsed from the maturity of the contract to the issuing of the fi. fa. The contract was dated 8th April, 1856, and matured in three years from that day. Counting out the period when the statute was suspended, the bar had not attached, even if the rule claimed by plaintiff in error was the correct rule of limitation, and which we by no means admit. We see, therefore, no error in the judgment of the court overruling and dismissing the affidavit of illegality and motion to vacate the judgment.

Let the judgment below be affirmed.

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# CLEGHORN vs. JANES.

- 1. 2. The verdict was not contrary to law, nor to the evidence.
- 3. Nor is the verdict contrary to the charge of the court.
- 4. Where two parties were contesting for the guardianship of a minor, one claiming it by reason of relationship, the other under a contract with the deceased father of the child, if the former introduced proof of sayings of the latter to show that there was no such contract, testimony of the latter in rebuttal and explanation of such statements could be considered by the jury with the other evidence in the case, in determining if there was a contract, and what it was, although the child's father had since died.
- 5. Where a party holds the affirmative side of an issue, he must bring sufficient testimony to satisfy the court and jury of the truth of what he affirms. When he has done that, the burden is shifted, and it devolves upon the other side to show that it was not the truth.
- (a.) It does not necessarily follow that, if two witnesses testify to opposing facts, the onus of proof has not been carried. The credibility of witnesses is for the jury, and they may believe one in preference to the other.
- 6. If a father agreed for another to have the custody of his infant child for an indefinite period, and thereupon the latter took and cared for it during the lifetime of the father and afterwards, such person, if a suitable and proper person to have the custody of the child, would be entitled thereto until it was fourteen years of age, in preference to its next of kin.

New Trial. Verdict. Charge of Court. Onus Probandi. Minors. Parent and Child. Guardian and Ward. Witness. Before Judge UNDERWOOD. Floyd Superior Court. March Adjourned Term, 1881.

Reported in the decision.

ALEXANDER & WRIGHT: J. BRANIIAM, for plaintiff in error.

C. ROWELL; DABNEY & FOUCHE; JUNIUS F. HILL-YER, for defendant.

# CRAWFORD, Justice.

Mary Hillyer Scott, the subject of this litigation, was left motherless when she was only twelve or fifteen days old. Two days thereafter, a delicate and feeble infant, she was confided by her father to the care of Mrs. Mary Hillyer Janes, for whom she had been named—a very devoted friend of the deceased mother, who was herself an orphan, and had been partially brought up in the house of Mrs. Janes' father; was her room-mate, and so close were the relations between them all, that she called Mrs. Janes "sister," and her parents "father" and "mother."

For three years immediately succeeding the time of assuming the care of this infant, Mr. and Mrs. Janes lived in the house with Mr. Scott—the father—having the entire charge and management of the child. About this time the father married again, and Mr. and Mrs. Janes moved away and carried with them the child. Something like a year after this event, Mr. Scott died, making no testamentary or other disposition of this little girl, who was then both fatherless and motherless.

Very soon, however, a contest arose over the matter, by Mr. Cleghorn's getting possession of Minnie, as she was then called, and claiming that, in right of his wife, who was the aunt of the child, he was entitled to the guardianship of her person. This claim was most vigorously resisted by Mr. and Mrs. Janes, who set up their right to the possession, custody and control of the child, under and by virtue of an agreement made with the father, in the first days of her existence, by which they undertook the nursing, care and attention of the said child, upon the condition that their possession of it should be permanent.

In pursuance of the claim insisted upon by Mr. Cleghorn, he made application for the guardianship of the person of Minnie, to which application Mr. Janes filed a caveat upon the grounds set forth above, as well as that it was also the desire of the deceased mother; and, further,

that standing as he did in loco parentis, he was entitled to the guardianship.

Upon the trial, under the evidence and the charge of the court, the jury awarded the custody of the child to Janes. Cleghorn moved for a new trial upon several grounds set forth in the motion; this was refused by the court, and this refusal is the error assigned.

- 1, 2. The first two grounds taken in the motion for a new trial are statutory; and when tried by the record, the court did not err in overruling them.
- 3. The third ground was, because the jury found contrary to the following charge of the court, to-wit: "Neither Dr. Janes nor his wife are competent to prove a contract for the purpose of establishing a right to the guardianship or custody of the child. The purpose for which their evidence was admitted, was to enlighten the judgment of the court and jury as to what would be a proper disposition to make of the child. Their testimony alone cannot establish a contract which the jury should, or could, enforce as a contract."

The verdict of the jury is not, in our view of it, contrary to this charge of the court, but in perfect harmony therewith.

4. The fourth ground was, because the court erred in giving to the jury the following charge, to-wit: "If the applicant, Cleghorn, has introduced and relies upon the sayings of Mrs. Janes to show there was no contract between Janes and wife and Captain Scott as to the custody or control of the child, then the evidence of Mrs. Janes in rebuttal and explanation of such may be considered by the jury, in connection with the other evidence in the case, in ascertaining whether there was a contract, and what that contract was."

This charge was very properly given, and, indeed, it would have been error in the judge not to have given it. Cleghorn had introduced in evidence the sayings of Mrs. Janes to various persons, to show that there never

had been any contract between Mr. Scott and herself as to the custody or control of the child. To have allowed that testimony to have been submitted and shut out what else Mrs. Janes had said in the same connection, or to have denied her the right of explanation, would have been contrary to all the rules of evidence.

Further, when admitted, to have destroyed its legal effect, because it might have shown a contract, would have been equally unjust. Cleghorn chose to go into those sayings, and he had a perfect legal right to do so; but when he did, it opened the door for Mrs. Janes to testify to that which, for her, would have been otherwise illegal. We think that there was no error in overruling this ground of the motion.

5. The fifth ground was, because the court erred in giving to the jury the following charge, to-wit: "If Janes and wife at any time relinquished their right to the custody of the child, with a full knowledge of all the facts, then they are bound by it; but it is incumbent on Cleghorn to prove this relinquishment. The onus is on him; and if the only proof on this subject is the testimony of Cleghorn asserting that the relinquishment was made, and the testimony of Janes denying that it was made, that would not be sufficient to remove the vnus or to establish the relinquishment, if both the witnesses are equally credible. In all cases where the burden is upon a party, he must remove that burden by a preponderance of proof. Two witnesses of equal credibility swearing, the one one way and the other the reverse, does not remove the burden. So in this case, if Cleghorn swears the relinguishment was made, and Janes swears it was not made, if both are equally credible and unimpeached, the relinquishment is not legally proved."

This charge is not in conformity with the ruling in 47 Ga., 26; but we think that a fair construction, both of that ruling and this charge would imply, that where a party holds the affirmative side of an issue, that he must

bring sufficient testimony to satisfy the court and jury of the truth of what he affirms, whether it takes one witness or twenty. When he has done that the burden is shifted, and it devolves upon the other side to show that it is not the truth, and such is the Code, §3758, which says that "the burden of proof generally lies upon the party asserting or affirming a fact, and to the existence of whose case or defence the proof of such fact is essential."

In this charge the judge tells the jury that "in all cases where the burden is upon a party, he must remove that burden by a preponderance of proof."

Cleghorn had asserted, that Janes and his wife had relinquished their right to the custody of the child, and the judge held that it was incumbent on him to prove it, and told the jury that the burden was upon him to do so.

Code, §3759 declares, that "what amount of evidence will change the onus or burden of proof, is a question to be decided in each case by the sound discretion of the court." It was this rule of law which we apprehend that the judge was giving in charge; and if he had added, that the jury, however, were to judge of the credibility of the witnesses as in other cases, and find accordingly, there could have been no complaint of his charge. Such, indeed, would have brought it within the principle ruled in the case cited.

6. The sixth ground was, because the court erred in giving to the jury the following charge, to-wit: "If during Capt. Scott's lifetime he entered into an agreement with Janes and wife to let them have the custody of the child for an indefinite period, and under that agreement they did have the child's custody up to the time of Capt. Scott's death, then they would have a right to the custody of the child until she became fourteen years of age."

We fully concur with the judge in this part of his charge to the jury; and especially so if he did, as we presume was the fact, also charge them in the same connection, "provided always that if Janes and his wife

were still suitable and proper persons to have the personal custody and control of the child," and for which there was ample testimony.

Our opinion, therefore, in this case is, that the judgment and verdict are right, and the jury exercised a wise and proper discretion in their finding. And this notwithstanding the high moral character and unquestioned fitness of Mr. Cleghorn, as shown by all the witnesses, to have had the guardianship. Yet Mr. Janes was shown by the proof also to be altogether worthy The dving mother, with of this now sacred trust. almost her last expiring sigh, bequeathed her helpless infant to the friend of her own early childhood. She herself, when but ten years of age, had been entrusted largely to Mrs. Janes' care, and felt that none other than this her foster sister could so well fill a mother's place. The testimony discloses the fact to be, that the trust and confidence thus bestowed was not misplaced. For two years the delicacy and helplessness of this bereaved child scarcely allowed to these parties a night of unbroken rest. They cared for it as their own, and when the father brought into his family another mother for his other children, he brought none for this. It, by his consent, went out from under his roof, with those upon whom its little eyes had so long been accustomed to look with love and affection, and to whom it had gone with its little cares and troubles for sympathy. For ten years now this has been her home, these her only parents, and without disparagement to others, no human hearts upon this earth beat with as much love and interest for this orphan child as do Twelve upright men have said that we will leave this child where its parents placed it. The upright and able judge who listened to the words of witnesses, as they repeated them to those twelve men, has said that I will not disturb your finding. And this court say, that the verdict and judgment thus pronounced being in harmony with right, justice, and the rules of law, it is hereby now affirmed.

Judment affirmed.

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Belcher vs. Black et al., for use.

## BELCHER vs. BLACK et al., for use.

 The mere fact that a wife buys property belonging to her husband when sold for taxes does not of itself make the sale fraudulent, it appearing that she had separate property.

2. Where a husband's property was sold under a tax fi. fa., and his wife furnished money to an agent with instructions to buy, which he did accordingly, in a subsequent controversy arising under the levy of another fi. fa. on the property and the filing of a claim by the wife, it was competent to prove by the agent that at the time of furnishing the money she said it was her own and derived from her own acquisitions.

Husband and Wife. Fraud. Sales. Title. Evidence. Before Judge FLEMING. Decatur Superior Court. November Adjourned Term, 1880.

Reported in the decision.

JNO. E. DONALDSON; R. R. TERRELL, by brief, for plaintiff in error.

O. G. GURLEY, by brief, for defendants.

SPEER, Justice.

Two cost fi. fas., one in favor of Black and one of Charity Floyd, for use of officers of court, 7s. Belcher & Ferrell, issued 20th January, 1879, on judgments of date 17th October, 1877, from superior court of Miller county, were levied on sixty acres of land as the property of A. P. Belcher, lying in Decatur county, and was claimed by Piety Belcher. The levy was made 26th August, 1879. On the trial, J. L. Belcher swore the land in dispute was in possession of A. P. Belcher, who rented it and collected the rents until 1873 or 1874, when it was sold. Since it has been held by his wife, Piety Belcher, who has rented it and collected rents since, and who lived with A. P. Belcher up to his death. The fi. fa's levied were read and

### Belcher vs. Black et al., for use.

plaintiff closed. Claimant then offered a tax fi. fa. of the year 1875 vs. A. P. Belcher, dated 1st January, 1876, levied 3d October, 1876, on property in dispute, pointed out by defendant; also an entry on fi. fa. by sheriff of sale of land to claimant for \$31.00. Also a sheriff's deed to Piety Belcher for the land so sold and purchased, dated 7th November, 1876, and duly recorded.

J. L. Belcher testified that as agent of claimant, he bought the property for her at the tax sale, and took deed in her name, the money to pay for it was given to him by her; that at the time she said (her sayings ruled out); A. P. Belcher was confined by paralysis; had an income from some property of his own. Claimant had means of her own. Had a truck patch on the lot she claimed as her own, adjoining the one they lived on, from which she realized money. She made money by her needle, and had property in Thomasville, from which she received rents. O'Neal swore he boarded with claimant, and paid her \$15.00 per month.

Under this evidence, the case was submitted to the court by agreement without the intervention of a jury, who rendered a judgment finding the property subject, and entered judgment against claimant and her security on claim bond for the costs. Whereupon claimant moved for a new trial,

- (1.) Because the court erred in not ruling out the fi. fas.
- (2.) Because the court refused to dismiss the levies when plaintiffs in fi. fa. closed their testimony.
- (3.) Because the court refused to let J. L. Belcher testify that at the time he received said money of claimant to buy said land she said it was her own money and derived from her own acquisitions.
- (4.) Because the verdict was contrary to law, evidence and the weight of evidence.

The motion for new trial was overruled by the court, and claimant excepted.

In looking carefully through this record we cannot see

Belcher vs. Black et al., for use.

sufficient evidence upon which to predicate the condemnation of the property in dispute to these fi. fas. It appears that the judgment against the defendant in fi. fa. was not rendered until the 17th of October, 1877, and rendered in the superior court of Miller county. It further appears that this land was levied on by a tax fi. fa. against the defendant for the year 1875; the fi. fa. was dated 1st January, 1876, and was levied on this land on 3d October, 1876, sold on the first Tuesday in November, 1876, and purchased by the claimant, who took a sheriff's deed under said sale, and had the same recorded oth of November, 1876, nearly twelve months before the existence of the judgments now seeking to condemn it. It further appears that claimant, though the wife of defendant in fi. fa., had separate means and property of her own to raise the money she paid for the land. Under this proof we are not prepared to pronounce her conveyance fraudulent and void, which must be done to subject this property. We will not presume it fraudulent merely because the wife of the defendant in fi. fa. became the purchaser at this judicial sale. Under the law she is a feme sole as to her separate property, and if with it or its proceeds she chooses to purchase bona fide at a judicial sale the property of her improvident husband, we are not prepared to condemn the transaction as fraudulent in the absence of all proof making it so. Neither can we agree with the court in ruling out and not considering the testimony of the agent, who, when he received the money from her to buy the land purchased would have testified, "she said it was her own money, realized from her own acquisitions." We think this declaration was competent evidence as accompanying the act of furnishing the money for the purchase. Code, §3773; 62 Geo., 257; 64 Ib., 410.

Let the judgment of the court below refusing a new trial be reversed.

### THE PRINCETON MANUFACTURING COMPANY vs. WHITE.

- 1. While sections 1918 and 3154 of the Code prescribe the mode of distribution of the assets of an insolvent firm when done by the law itself, they do not limit the power of a debtor to give legal preference to one creditor over another, not reserving any interest for his own benefit, or that of any other favored creditor, conferred by section 1953.
- A voluntary assignment by a debtor in New York, for the benefit of creditors, not repugnant to the laws of this state, carried the title to a debt due such assignor in Georgia.
- (a.) Such an assignment violates no law or policy of this state, and a creditor who served garnishment upon the Georgia debtor subsequently to the assignment could not hold the fund.

Debtor and Creditor. Assignments. Title. Garnishment. Before Judge ERWIN. Clarke Superior Court. May Term, 1881.

Reported in the decision.

R. B. RUSSELL, for plaintiff in error.

L. & H. COBB, for defendants.

CRAWFORD, Justice.

Moore, Jenkins & Co., of the state of New York, on the 17th day of September, 1880, made an assignment of all their property, individual and partnership, for the payment of their debts. The assignee, also of the state of New York, accepted the trust. The Princeton Manufacturing Company, of this state, being a creditor, to the end that it might recover its debt, on the 18th day of October, 1880, sued out attachment and served garnishment on James White, who admitted assets in hand to the amount of \$500.00, but set out the assignment and notice thereof before service was perfected upon him.

On the answer, counsel for the company moved the

court for a judgment against the garnishee, which motion was overruled, and the court ordered that the garnishment be dissolved.

This ruling is the error complained of.

1. The single question thus presented by this case is, whether a voluntary assignment, made in New York, of all the individual and partnership property of a firm, carries with it such assets as are in this state at the time of the assignment, to the exclusion of a subsequent attaching creditor.

The property of a non-resident debtor in this state is subject to seizure and sale; if, therefore, the deed of assignment had not passed the right to this fund out of Moore, Jenkins & Co., it was liable to a judgment of that court for the payment of this debt.

Subject to some exceptions, a voluntary assignment in one state, valid by the laws of that state, operates to convey personal property, not under lien, in every state where it may be found. One of the exceptions is, when the assignment is repugnant to the laws of the state where the property is found.

It was contended by counsel for the plaintiff in error, that this assignment was invalid by the laws of New York, and that the provision for the payment of the individual assets to individual creditors only, was contrary to the express law and policy of this state.

On the first point, it is a sufficient reply to say that the untraversed answer of the garnishee states that the assignment had been made in the state of New York, and that it passed the title to all the property and assets of Moore, Jenkins & Co. to the assignee, and, in verification of his answer, he filed an authenticated copy of said assignment.

On the second point, the only question is whether section 1953 of the Code is limited by sections 1918 and 3154.

By section 1953, it is provided that a debtor may give legal preference to one creditor over another, so that he

makes no reservation for his own benefit, or other favored creditors.

By section 1918 it is declared that where one of the partners of an insolvent partnership dies, who is himself insolvent, the creditors of the partnership cannot claim to share the individual assets of the deceased partner until the individual creditors have received an equal per centage from the individual assets that the partnership creditors have received from the partnership assets.

Section 3154 provides, that when joint assets are exhausted, joint debts may come on individual assets, but individual debts must first be advanced the *pro rata* amount received on the joint debts.

We cannot appreciate the force of this objection, for, as we view it, these sections direct the mode and manner of distributing the assets of insolvent partnerships when done by the law itself.

But when the right of legal preference is exercised by the deb.or, under section 1953 of the Code, that necessarily precludes the distribution under the other sections. Besides, the policy of the law is just the same under either statute, and either may be adopted. It may just as well be said that the policy of the law is against making wills because a rule is provided for the distribution of estates where no will is made.

2. But the question most strongly urged before us was, that our citizens would be compelled to go abroad to seek dividends, when our courts have the means of satisfying them under their own control. This goes to the very foundation of the whole case, and must be ruled upon.

Whatever may have been the rulings in the past, relative to the general operations of bankrupt or involuntary assignments, which is the source of the decisions relied upon by counsel for the plaintiff in error, it is now settled in most of the states that all voluntary assignments, if valid where made, and not repugnant to the *lex rei sita*, will be enforced.

Even in Massachusetts, where very strong doctrine, adverse to this principle, was laid down in the case of Ingraham vs. Geyser, 13 Mass., 146, and cited by plaintiff in error, it has been reviewed in Blake vs. Williams, 6 Pick., 286, and the supreme court say: "We do not think that it was intended to go to the extent of deciding that in all circumstances an attaching creditor should prevail over the assignee of the debtor under a transfer made abroad. It was certainly not intended to decide that a bona fide, transfer by a debtor abroad to his creditors, or to trustees for their use, in such form as would be valid to pass the property if made within this state, would be set aside for the benefit of creditors who had acquired no lien until after the making of such assignment." Also, in a later case the same views were more strongly maintained. Means vs. Hapgood, 19 Pick., 105.

In the case of Caskie vs. Webster, 2 Wallace, 131, where Ingraham vs. Geyser was cited, Justice Grier says: "A debt has no situs, and follows the person of the creditor. A voluntary assignment of it by the creditor, which is valid by the law of his domicile, will operate as a transfer of the debt which should be regarded in all places. In America, bankrupt or involuntary assignments, by operation of law, have not been considered as subject to this rule. But I know of no other established exception to the general rule, that a transfer of personal property, valid by the law of the owner's domicile, is valid everywhere." To the same purport are the following authorities: Burrell on Assignments, 368 to 372; Story on Conflict of Laws, \$\$396, 398, 399, 400, 400(a) and 404.

The same doctrine was followed to a sufficient extent to cover this case by our own supreme court, in the cases Mason & Fant vs. Striker & Co. et al., 37 Ga., 262, and Miller vs. Kernaghan, 56 Ga., 155.

Judgment affirmed.



### HUNT vs. HARDWICK & COMPANY.

- In ascertaining the value of a stock of goods in a store at a given time, it is admissible to show what was its value a short time previous thereto.
- 2. The question being whether one partner was induced to pay a certain price for the interest of his copartner by false representations of the latter, if the seller made such statements solely on information derived from a clerk of both of them, and the purchaser knew that such was the case, the falseness of such statements would not avoid the trade, if the seller correctly reported them as received from the clerk.
- 3. The verdict is not contrary to law, evidence, or the charge of the court.
- (a.) If a party to a contract seeks to avoid it on the ground of fraud or mistake, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he remains silent, keeps the property received under the contract as his own, and recognizes it by making payments thereon without complaint long after discovery of the fraud, he will be held to have waived his objection, and will be bound as though no fraud had occurred.

Evidence. Fraud. Partnership. Contracts. Before Judge FAIN. Whitfield Superior Court. April Term. 1881.

Reported in the decision.

- W. C. GLENN; JOHNSON & McCAMY, for plaintiff in error.
  - J. E. SHUMATE, for defendants.

SPEER, Justice.

Defendants in error brought their suit against plaintiff in error upon a promissory note for the sum of seven hundred dollars, dated on 11th December, 1875, and due 1st October, 1876, with certain credits thereon, said note payable to H. A. Lowry or bearer.

To the suit defendant below pleaded that the note is now and ever has been the property of the payee, H. A. Lowrv. That it was given for a one-half interest in a stock of drugs, medicines, etc., belonging to the defendant, and Lowry, the payee of the note, who had been doing business under the name of Hunt & Lowry. That on the trade defendant bought on the representation of Lowry that there had been an inventory taken of the stock just before the trade, and that it amounted to over two thousand dollars: that there was enough owing to the partnership to pay all its debts. That defendant had no means of knowing how much the stock amounted to without taking an inventory himself. That he relied on the assurance the inventory had been taken. That the books were locked up and the key to the safe was inaccessible at the time of the purchase. That defendant himself had lived at Rome, and had only been in Dalton two or three times since the business of Hunt & Lowry had been carried on, and then only for a few days at a Had all confidence in Lowry, his partner; believed his representations, and on them traded. That in fact there was only about \$1,000.00 worth of drugs, medicines, etc., in the stock. That it was false there had been another inventory taken; that the accounts on the books, of which there was only a small amount, were nearly all worthless, and that there was on the books, which he had to pay, debts due by the partnership of nearly six hundred dollars.

Under the evidence and charge of the court, the jury returned a verdict in favor of the plaintiffs, whereupon defendant below made a motion for a new trial, which was overruled by the court, and defendant excepted.

The grounds of error in the motion were:

(1.) That the court erred in permitting counsel for plaintiff below to ask D. G. Hunt, defendant, when upon the stand as a witness, the following question: "What amount of goods were in the store at the time of the sale to Lowry?"

- (2.) Because the court erred in charging the jury as follows: "The assertion, or representation, by the selling party as to its value and condition, if untrue, will not relieve the buyer of the obligation to inform himself from an examination for himself of his own business, provided he had equal facility to inform himself and was not relying on the information of his partner; and in determining the question of facility and ability to get correct information you may consider any evidence, if there be such, showing a superior knowledge as to the character and sort of business about which they are dealing. If you find that the representations made by the selling party were what he learned from the mutual agent, Garlington, and from the testimony you believe that Hunt knew that this information came from Garlington, then there would be no misrepresentation, if Lowry correctly represented what Garlington had told him."
- (3.) Because the jury found contrary to the following charge of the court: "If Lowry represented any thing as a fact, he is bound by the representation, whether he made it honestly or dishonestly, and it makes no difference whether he told what Garlington had said or not, unless he told Hunt he only spoke from what Garlington had told him. The strictest good faith is required among partners, and what would not amount to fraud as to third persons may be such as to a partner."
- (4.) Because the verdict is contrary to law, the charge of the court, the evidence and weight of evidence.
- 1. There was no error in allowing the evidence of D. G. Hunt as to the value of the goods at the time he sold a half interest to Lowry a few months previous to this transaction. It was one step in the mode of arriving at the value of the goods at the last alleged sale made by Lowry to Hunt, and which became an important fact under the issues on trial.
- 2. Neither was there any error in the charge of the court to the jury as set forth in the second ground of the

motion for new trial. If it be true that the representations made by Hunt to Lowry, by letter or otherwise, were based solely on information derived from the clerk, Garlington, and this fact was made known to Lowry before the sale, under the peculiar facts of this case, the court did not err in charging the jury "that there would be no misrepresentation if Lowry correctly reported to Hunt what Garlington had told him." As to whether this fact was true, there was a conflict in the evidence, and it was proper for the jury to pass upon it.

3. For the same reason, we see no error in our overruling the third ground of the motion for new trial. Whether Lowry made the false representations complained of as coming from the clerk, Garlington, and not on his own knowledge, as we before said, was a question of fact upon which there was a conflict of evidence, and we must presume the jury found on this point their verdict in accordance with their views of the testimony submitted, and adverse to the testimony of defendant. We are not prepared to say the verdict rendered is either against the law or testimony. Apart from the evidence submitted on the part of the plaintiff below, it must be borne in mind that this contract, which it is alleged was induced by fraud and false representation in two very material facts, was, so far as the record shows, not complained of when these false representations were discovered, but with full knowledge of their falsity, if they existed, defendant below went forward and made payments on said note years after it matured, and thus seemingly acquiesced in and ratified the alleged contract made. It is a well settled rule that a party who is entitled to rescind a contract on account of fraud or false representation, when he has full knowledge of all the material circumstances of the case, if he freely and advisedly does any thing which amounts to the recognition of the transaction, or acts in a manner inconsistent with its repudiation, it amounts to acquiescence, and though originally impeachable, the contract becomes

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unimpeachable even in equity. Kerr on Fraud and Mistake, 301-2-5; 54 Ga., 384; 48 Ib., 109; 40 Ib., 190.

So, a mistake or fraud from which a party seeks relief must not have arisen from negligence, or a blind and unsuspecting confidence, where the means of knowledge were easily accessible. The party complaining must have exercised at least that degree of diligence which may be fairly expected from a reasonable person. If after a contract induced by the fraud or misrepresentation of another the party injured is silent, and continues to treat the property received under the contract as his own, he will be held to have waived the objection, and will be as conclusively bound by the contract as if the mistake or fraud had not occurred. 3 Otto, 55. If a party seeks to avoid a contract on the ground of fraud or mistake, he must, upon the discovery of the facts, at once announce his purpose and adhere to it. If he be silent, and treat the property received under the contract as his own, and go forward and seemingly ratify and recognize it by making payments thereon without complaint, long after the discovery of the fraud or falsehood, he will be held to have waived the objection, and will be as conclusively bound by the contract as if no fraud or mistake had occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. 3 Otto, 62.

Tested by these well established rules applicable to such cases, we are not prepared, under the evidence submitted, to hold there was error in the refusal of this new trial by the court below.

Let the judgment below be affirmed.

# CUNNINGHAM et al. vs. Schley et al.

- 1. A retraxit is the open, public and voluntary renunciation by the plaintiff in open court of his suit or cause of action, and if this is done by the plaintiff and a judgment entered thereon by the defendant, the plaintiff's right of action is forever gone.
- 2. When a party to a contract seeks to enforce the same by bill for specific performance, and obtains a decree thereon, the contract is merged into the decree. Such contract and the decree founded upon it will not be set aside at the instance of the party who took it, on the ground that the defendants refuse to fully comply with it, and that on account of insolvency they cannot be compelled by execution to do so, as provided in the decree. Especially will such decree stand in the absence of any allegation of fraud, accident or mistake, or that insolvency had occurred since it was rendered.
- (a) A consent decree is not the subject of a bill of review.

Retraxit. Equity Contracts. Judgments. Before Judge SNEAD. Richmond Superior Court. October Term, 1880.

Reported in the decision.

FOSTER & LAMAR; J. C. C. BLACK, for plaintiffs in error.

W. W. MONTGOMERY, for defendants.

# SPEER, Justice

Defendants in error filed their bill in the court below in 1879, alleging that they were the children of George Schley, deceased, who died testate in 1866, reciting in his will that he owed a certain sum to his children under a marriage settlement by the terms of which the property therein conveyed was settled upon his wife, the mother of said defendants in error, for life, with remainder to her children. Said settlement was recorded in Jefferson county, but the records were destroyed and the original lost.

The original property covered by said settlement was

sold by their father, and other property subsequently bought by him, including a plantation of three hundred and twenty-five acres, immediately east of and adjoining the city of Augusta, known as Eldorado, the title to which he took in his individual name.

As soon after their father's death as the law permitted, the defendants in error filed their bill against his executors for the purpose of tracing their trust funds into property purchased by their father in his individual name.

About the time the Schley children filed their bill aforesaid, the Cunningham children, plaintiffs in error, also filed their bill against the executors of George Schley to recover a large balance claimed to be due them by said George Schley as their guardian.

Pending said litigation Robt. and Wm. Schley, executors of George Schley, resigned their trust, and C. A. Rowland was appointed administrator de bonis non, and made a party in said consolidated case. Soon after the affirmance by the supreme court of the decree above mentioned, the Schley children demanded of said administrator the possession of Eldorado. In the meantime a general creditor of George Schley had obtained a judgment against his estate and levied the fi. fa. on Eldorado, and for this reason said administrator refused to comply with said demand, and filed a bill of interpleader against the Schley children and general creditors of the estate, which was insolvent, and said Cunningham children, calling upon them to interplead and settle the priority of their claims

as to Eldorado, said Cunninghams had the bill dismissed as to them.

The case under said bill of interpleader was referred to a referee to decide whether Eldorado was assets in the hands of the administrator to pay general creditors or the property of the Schley children. The referee reported the property was assets in hands of administrator to pay debts due general creditors, to which report the Schley children filed exceptions. Pending these exceptions, the Schley and Cunningham children entered into a written agreement, whereby the Schley children engaged to surrender for the benefit of the Cunningham children, in such form as the latter might select, all their claims against Eldorado which they had by the aforesaid decree rendered by Judge Andrews. In consideration of which, the Cunningham children agreed that, if it should be decided they were entitled to the proceeds of Eldorado under their judgment against the estate they, the Cunningham children, would cause to be paid to the Schley children, out of the proceeds of said place, the sum of \$2,500.00 with interest from date, and would also cause to be paid to said Schley children the sum of ten per cent. on the net proceeds of a cotton claim of said Schley's estate against the United States, if said claim should be recovered, and it be held the Cunningham children were entitled to the same on their judgment.

The Cunningham children selected, as the mode by which said surrender should be made, an order on the minutes of the court, setting aside the decree of Judge Andrews giving the Schley children Eldorado and a retraxit entered by the Schley children on the minutes of the court, both of which were done.

At same time said entry was made and entered on the minutes, the Cunningham children were reinstated as parties to said bill of interpleader, and at the following term entered a judgment nunc pro tunc on said retraxit, declar-

ing Eldorado to be assets in the hands of the administrator *de bonis* of George Schley for payment of debts according to their priority, and that the Cunningham children will be first paid in full over all other claims.

This decree was rendered in 1875. Rowland resigned as administrator, and R. E Cunningham was appointed. Prior to Rowland's resignation, R. E. Cunningham had rented Elderado from Rowland for several years, and had given his notes for the same, to the amount of more than \$9,000 00, which were unpaid. Rowland turned over to Cunningham, as administrator, all the unadministered assets in his hands. Executions were issued in favor of the Cunningham children upon the judgments against the estate of George Schley, and were placed in the hands of their counsel, W. W. Montgomery, Esq. He ordered them levied upon the Eldorado property, for the purpose of collecting fees he claimed due him by the Cunningham children.

They filed a bill to restrain the levy, complaining that Montgomery had grossly mismanaged their case, and especially, of the compromise above referred to.

The Cunningham children having failed to comply with their agreement, the Schley children filed their bill against Rowland, administrator, and against the Cunninghams, to compel compliance with said agreement, pending which R. E. Cunningham became administrator in place of Rowland, as above stated, and in his answer stated that Montgomery had recorded an attorney's lien on Eldorado, and it would be inequitable to force a sale of Eldorado under the circumstances. He admitted having received, on the cotton claim against the government referred to in the contract, the sum of \$8,351.42.

A decree on this bill was taken by agreement, that the Schley children should recover of the Cunningham children \$835.00, less five per cent., with interest since August, 1876, to be paid at once; also that the Schley

children should recover of the Cunningham children \$2,500.00, with interest, to be paid out of the proceeds of Eldorado. That the sale of said place should be made as soon as possible after the final decision between the Cunningham children and Montgomery was had. And if said sale was not made in sixty days after said decision, then the complainants should have execution against the Cunningham children individually, and R. E. Cunningham administrator of George Schley, for the amounts.

A final decision was made in the case between the Cunningham children and said Montgomery at the April term, 1878, and though nearly twelve months have elapsed, the Cunningham children have taken no steps to have Eldorado sold; nor have they paid complainants any part of the \$2,500.00 decreed to them.

They allege that to issue execution on their judgment against the Cunningham children would be unavailable since they have no property to levy on, and especially is this true of R. E. Cunningham, who is chiefly at fault for the non-compliance with the terms of said decree, and the Schley estate is entirely insolvent, and their claim cannot be considered a debt against the estate. The Cunningham children, not only fail to sell Eldorado under their fi. fas recorded against the Schley estate, and which could be made available for that purpose, but on the contrary, R. E. Cunningham is retaining the use of the same for the defendants, and is not attempting to administer it in any way. R. E. Cunningham could have easily carried out the consent decree aforesaid. Since the same was rendered, he has received for the estate a large amount of money on the cotton claim · due the estate from the United States, of which sum the Schley children have only received the percentage on the cotton claim, as provided in the contract. is further alleged, that while Rowland, as adminis-

trator, had charge of the Schley estate, he received \$3,500.00 for the right-of-way for the Port Royal railroad, which he also paid to R. E. Cunningham as administrator.

The Schley children, upon the foregoing statement of facts, filed their bill against the Cunningham children for the rescission of said contract, and for the vacating of all decrees assented to by them under said contract, and since the same was entered into whereby Eldorado was declared to be assets in the hands of the administrator of Schley's estate for the payment of his debts, and for vacating and setting aside the order modifying and altering the decree of Judge Andrews before referred to, and the retraxit of judgment nunc pro. tunc entered thereon, and that all parties may stand as they were at the time said contract was entered into, and that the decision of the supreme court affirming the judgment of Judge Andrews be of full force and effect as originally rendered, the complainants offering to account for the sum admitted to have been paid them as the per cent. on the cotton claim. That Eldorado be decreed to be their property under the decree aforesaid, and an accounting be had of the rents, issues and profits of Eldorado since the same was turned over by Rowland as administrator, and the rent notes given by R. E. Cunningham. That they may, by decree, be placed in possession of said place, and that R. E. Cunningham be enjoined from any attempt, as the administrator of Schley's estate, to sell Eldorado, and all the Cunningham children be enjoined from levying any execution they hold against the Schley estate upon said Eldorado, and that a receiver be appointed to take possession of said place and manage it.

To this bill the Cunningham children demurred on the grounds following, to-wit:

- (1.) There is no equity in said bill.
- (2.) Complainants have an adequate remedy at law.

# (3.) Said bill is multifarious.

The demurrer was overruled and defendants excepted. The complainants below are seeking by their bill to rescind a contract which, on their application, has been decreed to be specifically performed, and which decree was rendered by consent of both parties to the contract without any allegation of fraud, accident or mistake, entering into or inducing said contract or the decree for specific performance thereon. Not only does complainants' billseek the rescission of the contract and the cancellation of the consent decree thereon, on the sole ground that the Cunninghams have failed and refused to comply with the terms of said contract and decree, and still fail and refuse so to do, but they further seek to vacate all decrees assented to by complainants under said contract since the same was entered into, whereby "said Eldorado was declared to be assets in the hands of the administrator of George Schley for the payment of his debts," as well as for the vacating and setting aside the order modifying the decree of Judge Andrews hereinbefore referred to. and the retraxit of complainants and the judgment nunc pro tunc thereon entered, and that the said plantation, called Eldorado, may be decreed to the property of complainants, etc.

I. The object of the bill seems to be to place complainants in the position they were at the time the decree was rendered by Judge Andrews. One serious obstacle to the relief sought by complainants' bill is the renunciation by means of the retraxit which complainants filed since the decree in their favor rendered by Judge Andrews in which retraxit they, by their written agreement, stipulated "to surrender for the benefit of the Cunningham children all their claims against Eldorado, which they had by the aforesaid decree rendered by Judge Andrews." A retraxit is the open, public and voluntary renunciation by the plaintiff in open court of his suit or cause of action, and if this is done by the plaintiff and a judgment

entered thereon by the defendant, the plaintiff's right of action is forever gone. Code, §§3445, 3446; 6 Ga., 432; I Ala., 45.

2. But is this bill maintainable under the allegations therein contained? Admitting that the *retraxit* made with judgment entered thereon does not bar complainants from seeking the decree of cancellation, still could a decree be set aside under the allegations therein contained?

The judgment of a court of competent jurisdiction may be set aside by a decree in chancery for fraud, accident or mistake, or the acts of the adverse party unmixed with the negligence or fault of the complainant. Code, §3595.

In this bill there is no allegation of fraud, accident or mistake, by reason of which the contracts, ought to be set aside, was induced. Nor is there any allegation charging that the judgments or decrees, and orders, retraxit, etc., were procured by any fraudulent means on the part of defendants' below, or by reason of any accident or mistake entering therein. The only complaint made or reason given is, that the Cunninghams are insolvent, and failed or refused to comply with the terms of the decree. It is not alleged that this insolvency has occurred since the decree, and we cannot see any good reason why the mere inability of a party to perform a decree on the score of insolvency would be a good reason either to vacate or set aside.

The defendants below have partially satisfied the decree sought to be set aside; and, as under its provisions, on failure further to comply by the paying of the \$2,500. 00, complainants have a right to enforce the payment thereof by execution against the defendants as well as the property of the estate, until all their remedies under their decree fail, it would be premature for a court of equity to interfere by such a bill as is herein filed.

The authorities relied upon by counsel for the defend-

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ants in error, are applicable so far as we have been able to examine them, to the rescission and cancellation of contracts.

No case has been cited where a contract, the specific performance of which has been decreed, is made the subject of rescission or cancellation on the part of the plaintiff in the decree.

If he sets up a contract, and asks the aid of a court to have it specifically performed, a decree thereon ratifies and confirms the contract, and he will be estopped from seeking either to vacate or to rescind it.

One who seeks and obtains a judgment of a court in his own favor, and upon a case made upon his own pleadings, will not be heard either to vacate it or set it aside, unless at least the same was rendered through fraud, accident or mistake, unmixed with negligence on his part.

This principle was recognized by this court in the case of Branch & Smith vs. Carswell, trustee, decided at the September term, 1880, of this court. If, instead of seeking a court of equity to enforce by its decree the contract now complained of, the complainants below had sought its aid to vacate and set aside said contract upon a proper case made, they could have had the relief sought. But their election was to enforce the contract, and not to set it aside, and for this purpose they sought and obtained a decree of the court.

Our view is that such a contract becomes merged in the decree rendered upon their bill. Complainants have voluntarily and advisedly acted on their election in this matter, in the hope that it might turn out to their advantage; if they have not reaped its full fruits it is their misfortune, if not their fault; the decree, at least, is conclusive upon both parties. 62 Ga., 604. Code, §§3750, 3577, 2897; 40 Ga., 199; 17 Ib., 110.

The difficulties in the way of complainants are moreover increased by the fact that the decree sought to be vacated was rendered with the *consent* of both parties. Craig vs. Watson.

Such a decree is not the subject of a bill of review, as was held by this court in 7 Ga., 110, and authorities cited. Under all the charges and allegations as set forth in complainants' bill, in the entire absence of any charge of fraud, accident or mistake, on the part of defendants to induce complainants to enter into said contract, and in view of the fact that complainants have sought and obtained a consent decree specifically enforcing said contract, and have taken a benefit thereunder, we hold that they are bound, not only by the contract, but also by the decree they have sought for the enforcement of the same.

We think, therefore, that the court erred in not susstaining the demurrer to complainants' bill.

Let the judgment of the court below be reversed.

JACKSON, Chief Justice, concurred upon the ground that there was no allegation that the consent to the decree sought to be set aside was obtained by fraud, accident or mistake. Whilst thus concurring he does not wish to be understood as dissenting from any thing said by Justice Speer, but simply to indicate the ground of his concurrence.

# CRAIG vs. WATSON.

- 1. The verdict in this case was contrary to law and the evidence.
- 2. A general recovery in ejectment, where no mesne profits are recovered as rent for the current year, and no claim is put in issue by defendant to the crops of the year, includes the land and whatever passes with the realty, including crops unsevered therefrom. Therefore, after such a recovery, assumpsit could not be maintained by the defendant against the plaintiff in ejectment for the value of the crops, based on a contract to cultivate the land and pay the rent to the true owner, alleged to have been made prior to the recovery in ejectment.

New Trial. Judgments. Res Adjudicata. Ejectment. Title. Before Judge ERWIN. Gwinnett Superior Court. March Term, 1881.

## Craig vs. Watson,

Reported in the decision.

W. E. SIMMONS; S. J. WINN, for plaintiff in error.

N. L. HUTCHINS, for defendant.

CRAWFORD, Justice.

On the sixth day of February, 1879, George W.F. Craig brought an action of ejectment in the statutory form against Jane A. Head, Andrew T. Baugh, Scott L. Baugh and F. M. Watson, to recover a lot of land to which he claimed title and the possession of which they refused to surrender.

The parties were duly served, and at the March, or appearance term, they pleaded the general issue. The defendants, except Watson, also filed an equitable plea. At the September term thereafter, and on the fourth day of said month, a trial was had and a verdict rendered in favor of Craig for the land in dispute, with mesne profits for the year 1878.

F. M. Watson was the only one of the defendants who was in the actual occupation of the premises, and he surrendered the same to Craig immediately after the verdict, who took possession of the land and the crop.

Watson, one of the defendants in the foregoing case, on the ninth day of February, 1880, sued Craig to recover from him the value of the crop made on this land in the year 1879, and which Craig received from him without objection when the possession of the land was surrendered. He alleged a contract with Craig to cultivate the land and pay the rent to the true owner. Craig pleaded the general issue, special pleas denying any such contract, agreement or understanding with Watson about the land, that he was a trespasser and not entitled to a recovery. He further pleaded the judgment of recovery rendered in the ejectment suit.

Upon the trial of this latter suit a verdict and judg-

Craig vs. Watson.

ment was obtained against Craig for the sum of \$750.00. He made a motion for a new trial, because—

- (1.) The verdict was contrary to law and contrary to evidence.
- (2.) Being a party defendant to the ejectment cause pleading thereto, and defending the same, he thereby admitted that he held the land adversely to Craig and was estopped from setting up a contract in this case with Craig, asserting that his possession was not adverse, but permissive.

The motion for a new trial was refused, and that refusal is the error alleged in this court.

The controlling question in this case is, what was settled by the judgment of recovery in the action of ejectment? The parties to this suit were parties to that; the land upon which the crops sued for were grown was the land involved in that; whatever right of possession this plaintiff had arose prior to the commencement of that case; it existed concurrently with its progress, and at any stage of the cause could have been pleaded and made issuable. The judgment in ejectment settled the title in Craig; it settled the right to the possession in him for 1878 and 1879; that the adverse possession of all the defendants, Watson included, was tortious, that the rents, issues and profits were his for both years; and if he recovered none for 1879 he was entitled not only to the premises, but the growing crop. 39 Ga., 664.

These rights were judicially determined by the solemn judgment of the court having jurisdiction of the parties and the subject matter. That judgments are conclusive until set aside or reversed, needs no citation of authority. If, therefore, under the judgment in the ejectment cause Craig was declared the rightful owner of the land in 1879, and there was no rent recovered for that year, he took the land with the crop unsevered from the realty. How is it possible, then, for Watson to recover the value of the identical crop so remaining on the land from him, with

Elsas vs. Browne.

that judgment standing in all its binding force and conclusiveness directly in his way? The judgments are clearly inconsistent with each other, the first declaring that both the land and the ungathered crop were Craig's; the last that Craig must pay to Watson \$750.00 for a crop the whole of which he never owned.

We think this is sufficiently clear without further comment.

In the absence of rent in a judgment or verdict in ejectment suits, the plaintiff simply recovers every thing which passes with the realty. This would necessarily include the crop on the land. Whatever, therefore, had been separated from the land did not fall under the judgment, and did not pass to the plaintiff. Rents or growing crops are elements entering into the litigation, and if parties offer no proofs claiming rents, they must abide the legal effect of their judgments.

Judgment reversed.

## ELSAS vs. BROWNE.

To charge a minister of the gospel with collecting money for a specific object, and, instead of so appropriating it, with embezzling and applying it to his own wrongful uses, is actionable per se; if not imputing to him a crime punishable by law, it is certainly charging him with being guilty of a debasing act, which may exclude him from society.

Actions. Damages. Pleadings. Before Judge HILL-YER. Fulton Superior Court. April Term, 1881.

Reported in the decision.

HOPKINS & GLENN; S. WEIL, by brief, for plaintiff in error.

L. J. GARTRELL; WRIGHT & DORSEY, for defendant.

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Elsas vs. Browne.

# CRAWFORD, Justice.

This case comes before this court on a general demurrer to the following declaration, which, after argument had, was overruled by the court, and the defendant excepted:

"GEORGIA-Fulton County,

To the Honorable, the Superior Court of Fulton County.

The petition of Edward B. M. Browne showeth that Jacob Elsas, of said county, has injured and damaged your petitioner in the sum of twenty thousand dollars, by falsely and maliciously saying of and concerning your petitioner, on the second day of January, eighteen hundred and eighty-one, the following false and malicious words, to-wit: I have heard that on the excursion to Europe, aboard the Silesia, in June last, Browne (meaning your petitioner) collected seventy-five dollars from the passengers, in order to print a paper which was edited on the boat by Browne and others (and meaning by said Browne your petitioner) in memory of the excursion; but Browne (meaning your petitioner) used and embezzled the money (meaning the said seventy-five dollars) for his own wrongful uses, without printing the paper at all, and I will prove it; and such a man is unworthy to be a minister.' Wherefore your petitioner, etc."

Under the law of this state, there are four grounds upon which a suit for slander, or oral defamation, may be maintained. The first is, in imputing to another a crime punishable by law. The second, with having some contagious disorder, or being guilty of some debasing act, which may exclude him from society. The third, in charges in reference to his trade, office, or profession, calculated to injure him therein. By the act of 1847, it is provided that all suits for slander may be prosecuted under a form of action which simply charges the defendant with having said of and concerning the plaintiff certain false and malicious words, setting them out as spoken, and the suit, or complaint, shall be deemed and held sufficiently technical and full, and every thing else material for the maintenance of the action may be supplied by proof. Code, §3397.

In this case the words are set out, and whether the charge of embezzlement, taken with its context, makes

out a crime punishable by law or not, there still remain the words, that he collected seventy-five dollars and used the money for his own wrongful purposes. Were not these words under our law actionable; that is to say, did they not charge him with being guilty of a debasing act, which might exclude him from society? an act calculated to reduce him from a higher to a lower state; lowering him in purity, worth, and honesty, in the estimation of society, sufficiently to exclude him therefrom? It seems so to this court.

The declaration charges him with fraudulently converting seventy-five dollars to his own use, which was an act that might exclude him from society, and certainly ought to do so. Whilst we think that the declaration might have been more technichally drawn, yet the demurrer, being a general demurrer, should not have been sustained. Judgment affirmed.

THE FIRST NATIONAL BANK OF AMERICUS vs. THE MAYOR, etc., OF AMERICUS.

To recover taxes paid to a municipal corporation, it must appear that the tax was unauthorized; that the amount was actually received by the corporation; and that it was paid under compulsion, to prevent the immediate seizure or sale of plaintiff's goods, or arrest of his person. Voluntary payment, accompanied by protest, will not suffice.

(a.) The declaration in this case did not distinctly allege these requisites, and was demurrable.

Tax. Municipal Corporations. Actions. Before Judge CRISP. Sumter Superior Court. October Adjourned Term, 1880.

Reported in the decision.

B. P. HOLLIS, for plaintiff in error.

HAWKINS & HAWKINS, for defendants.

SPEER, Justice.

The First National Bank brought suit against the defendants, for the sum of sixteen hundred and thirty-nine dollars, besides interest, alleging that petitioner was or ganized as a national bank association, and under the laws of the United States, was empowered to carry on a general banking business in the city of Americus; that, from the year 1872 to the present, by virtue of the authority aforesaid, petitioner has been engaged in the banking business in said city; that petitioner is expressly exempted from the payment of any tax upon its business of banking, or upon its capital stock, except such tax as it is required to pay the government of the United States, as provided by section 5214 of the Revised Code of the United States. Further, petitioner alleges that, notwithstanding this exemption, the defendant wrongfully, and without any authority of law, has demanded of petitioner the sum of one hundred dollars per annum, as a license tax for carrying on the said business of banking in said city. Petitioner paid said tax under protest, and to avoid a seizure and sale of its property by said mayor and city council. Under this illegal assessment, it has paid the sums of one hundred dollars per annum from the year 1872 to 1877, inclusive, which was illegally extorted, as aforesaid, for carrying on said business, and which the congress of the United States had expressly licensed. Further, petitioner shows that, in the year 1874, while engaged in said business, under the authority aforesaid, defendant assessed a tax of one per cent. upon the capital stock of petitioner, making the sum of six hundred and thirty-nine dollars, which was illegal and void, as the same was not subject to taxation by said city. Petitioner protested against the payment of said sum, but to avoid a sale and seizure of its property by said mayor and council,

did pay the said sum, in the year 1874, and the sum of three hundred dollars for the year 1875. Since the year 1875, it has urged upon said defendants the justice and equity of returning said sums, thus illegally assessed, but they now refuse to pay the same; wherefore, petitioner brings suit, etc.

To this declaration, defendants demurred, which demurrer was sustained by the court, and plaintiff's action dismissed; wherefore plaintiff excepted, and assigns the same as error.

The question in this record, submitted for our consideration is, whether plaintiff has set forth a good and legal cause of action in his writ, and was there error in dismissing the same on demurrer.

To determine this question properly, it will be necessary to inquire under what allegations and proofs can a complaining party recover of the authorities an illegal tax that has been levied, and collected of the party complaining—that is, what must be alleged in the writ and what must be proved on trial, for it is well established as a rule of pleading that every thing must be alleged and proved that is essential to a recovery under the rules of law applicable to the cause on trial.

- 1. It is a well recognized rule, that a tax, voluntarily paid, even though illegally assessed by the taxing power, where there is no misplaced confidence, and no artifice, or deception, or fraudulent practice by the other party, cannot be recovered back. 50 Ga., 304.
- 2. So, where there is no ignorance, or mistake of facts, if money is paid to a corporation levying under a claim of right, under an ignorance or mistake of law, the same is not recoverable.

Under none of these grounds does the plaintiff here seek to recover. There is no charge of ignorance of fact, or of misplaced confidence, artifice, or deception, or fraudulent practice alleged against the defendants in levying

and collecting this tax, and by reason of which it was paid by the plaintiff. There is only one ground alleged, or set forth, in plaintiff's writ, and this is made to apply to all of the taxes alleged to be illegally paid, and which are sought to be recovered. The petitioner alleges that "it protested against the payment of said sums, but, to avoid the sale and seizure of its property by said mayor and council, did pay the said sums," etc.

Duress or coercion is here shadowed forth as the impelling or moving power of this payment now sought to be recovered. But do the facts or causes alleged constitute either coercion or duress? It is well settled that money paid under protest merely does not make the payment a compulsory one. 13 Gray (Mass.), 476.

Mr. Dillon, in his work on Corporations, lays down clearly and intelligently the rule. He says: "The coercion or duress which will render a payment involuntary, must in general consist of some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making payment." 2 Dillon, §943 (3d edition); Radick vs. Hudson, 95 U. S., 210; 4 Gill, 425; 18 Cal., 256; 1 Ohio, St., 268.

Tested by this rule, are there any allegations of facts in this writ that show "there was some actual or threatened exercise of power, by the party exacting or receiving the payment, over the person or property of plaintiff, from which he had no other immediate means of relief?" We see none. The writ must be construed most strongly against the pleader. The presumption is, he put his cause on record as favorably to himself as the truth of the case would warrant, and all he sets up by way of compulsion to justify or excuse the payment was, he did so "under protest, and to avoid a sale and seizure of his property."

Three elements are essential, and must concur, to

sustain an action to recover back money on the ground of the illegality of the tax:

First. The authority to levy the tax must be wholly wanting.

Second. The money sued for must have been actually received by the defendant corporation.

Third. The payment of the plaintiff must have been made upon compulsion, to prevent the immediate seizure of his goods or the arrest of his person, and not voluntarily made.

Unless these conditions concur, paying under protest will not give a right to recovery. Dillon on Mun. Corporations, \$940.

There being no statutory right regulating this action in our state, we are remitted to the common law rule of force, and this is well and succinctly stated by the supreme court of the United States in two recent cases where actions were brought to recover back illegal taxes. Lamborn vs. Dickinson & Co., 97 U. S., 181 (1877); Union Pacific R. R. vs. Dodge County, 98 U. S., 541 (1878). In these recent cases that court lays down the following rule:

"Where a party pays an illegal demand, with full knowledge of all the facts which render such demand illegal, without an *immediate and urgent necessity therefor*, or unless to release (not to avoid) his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary, and cannot be recovered back. And the fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary." 2 Dillon, 947.

This rule was also fully recognized in a decision of this court in a recent case, at September term, 1880, not yet published, of the *Mayor of Savannah vs. Feeley*, which was a much stronger case than the one at bar.

Tested by this rule of liability, and we think it the correct one, the case, as set forth in plaintiff's declaration, falls far short of its requirements. But it is insisted that

a more liberal ruling by this court, in favor of a recovery in such a case, was made in 48 Ga., 309. In that case the court laid down the rule, generally, that a tax levied without authority of law may be recovered, but the case did not decide that a voluntary payment could be recovered under such circumstances, nor that a recovery could be had unless the payment was compulsory.

Public policy does not favor the institution of such suits. The complainant had his legal right to resist illegal taxes when levied, and when he acquiesces and knowingly pays an illegal assessment, and the sums raised are disbursed for the public good, of which he is one of the recipients, courts will not regard with favor a complaint that might have been prevented by the exercise of that diligence that the law favors. He must bring himself within the strict rule the law has fixed, that entitles him to recover; otherwise he must abide the consequences of his own default and negligence.

Let the judgment of the court below be affirmed.

## THOMPSON BROTHERS et al. vs. CUMMINGS & COMPANY.

- 1. The sale of cotton to be delivered at a future day, where both parties are aware that the seller himself expects to purchase to fulfill his contract, and no skill and labor or expense enter into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law, and can be enforced by neither party. But where such a contract is executed, an agent who may be employed by his principal to make the contract can recover from him any money advanced in the transaction by his authority.
- (a.) C. & Co., dealt in cotton futures during the day, received and posted telegrams stating the price of cotton, and required trades based on such telegrams to be made within ten minutes after such posting. At night they would buy or sell futures in their own names in New York, so as to cover the transactions of the day. T. Bros. bought futures of them, and they covered themselves as usual that night:

Held, that they were not the agents of T. Bros. but principals in the transaction.

2. No court will lend its aid to either party engaging in an illegal or immoral act. Therefore, he who deposits "margins" in the purchase of cotton futures cannot recover them by set off or otherwise.

Contracts. Cotton Futures. Principal and Agent. Actions. Before Judge STEWART. Newton Superior Court. March Term, 1881.

Reported in the decision.

A. B. SIMMS, for plaintiffs in error.

CLARK & PACE, for defendants.

CRAWFORD, Justice.

This suit originated on a sight draft for \$364.95, drawn by Thompson Bros., on Swann & Stewart, December 12th, 1879, which they refused to pay, and Cummings & Co. sued them and Thompson Bros., the drawers.

The defence set up to this suit was-

- (I.) That the draft was drawn to pay the losses upon the purchase of cotton "futures" from the plaintiffs, both parties knowing that there was no cotton held by either, and that the same was nothing but a mere speculation upon chances.
- (2.) Defendants further pleaded that the plaintiffs received and were indebted to the drawers the sum of \$478.76, which they had put up as a margin in the hands of the plaintiffs to cover losses in the event of a decline in the price of cotton.
- (3.) That John T. Thompson, the drawer of the draft sued upon, was intoxicated when the same was drawn, and that the said intoxication was procured by the plaintiffs.

It was also claimed on the argument that a plea of duress had been pleaded, but as none such as can be so held appears in the record, it cannot be considered.

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Under the testimony and charge of the court the jury found a verdict for the plaintiffs for the full amount of their draft. The defendants claimed that they found contrary to evidence and contrary to law, and that they were therefore entitled to a new trial, which the court refused, and they excepted.

Whether this verdict was right or wrong, must be determined by the evidence.

1. The sale of cotton to be delivered at a future day, where both parties are aware that the seller expects to purchase himself to fulfill his contract, and no skill and labor or expense enters into the consideration, but the same is a pure speculation upon chances, is contrary to the policy of the law, and can be enforced by neither party. But where such a contract is executed, an agent who may be employed by his principal to make the contract, can recover from him any money he may have advanced in the transaction by his authority. 45 Ga., 501. Code, §2638.

That this was a transaction in what is known as "cotton futures" seems to be admitted; and besides, that as between the buyer and the seller, the law is settled that the whole contract would be void. This then leaves the naked question to be decided by the jury, were Cummings & Co. the agents or the principals in the transaction?

The defendant, J. T. Thompson, a member of the firm of Thompson Bros., testifies that he was the purchaser of the "cotton futures," and bought them directly from Cummings & Co., and that they were not his agents to buy from others. That he bought from telegrams that were posted every hour on a blackboard in their office. That both himself and Cummings & Co. knew that there was no cotton held by either, that it was a speculation upon the price of cotton in the future. That he never expected any cotton to be delivered. That whenever a telegram was posted, they would say that customers must trade in ten minutes, or not at all, on that telegram.

H. E. Cummings, one of the plaintiffs, testified: "That in trading or selling futures in cotton J. F. Cummings & Co. required their customers to pay so much money on each bale as a margin, and if the cotton declined at any time after the contract or sale, sufficient to exhaust the margin, the contract was ended. \* \* \* Their rule was to sell to customers during the day; and at night they would themselves purchase in New York to cover sales. When they purchased cotton in New York through Lathrop & Co., they did so in their own name, they never purchased any cotton for Thompson Bros. in New York, but thinks that night they purchased a lot of five or six hundred bales of futures. not buy any futures in the name of Thompson Bros. Futures were bought in New York by them in their own names by their agents, Lathrop & Co., to cover their operations with their customers."

The foregoing testimony, without anything more, makes Cummings & Co. the sellers, Thompson Bros. the buyers. and no agency about the whole transaction, except that of Lathrop & Co., who bought for Cummings & Co. to cover "their operations with their customers." As we construe the evidence in this record, Cummings & Co. first sold on their own account, and then bought or not to cover their sales, as they thought it necessary. Witness Cummings says that "they did not buy immediately that their customers bought from them, nor did they sell at the time their customers closed out." We cannot, in any view, see any thing else in this whole testimony, but that they were themselves the dealers in these speculations upon chance; and if such is the fact, they cannot enforce this contract. That witness says that they were the agents of Thompson Bros., is but a conclusion of his, and is inconsistent with the facts detailed. But further, it nowhere appears that the \$364.95 was ever advanced or paid out to any one on account of Thompson Bros., which must be shown to entitle them to recover, when the prima Polk et al., commissioners, vs. James, ordinary, et al.

facie case made by tendering the draft in evidence is overcome.

2. The second matter of defence to be ruled is as to the indebtedness of the plaintiffs to the defendants for the sum of \$478.76, which had been put up as a "margin" to cover losses in the event of a decline in the price of cotton.

We hold that the defendants are not entitled to have this sum set off against the plaintiffs' claim, if it is recoverable, any more than he would be entitled to recover it in an original suit. Where parties engage in illegal transactions, the courts will not interpose to grant any relief. The principle of public policy is, that no court will lend its aid to a man upon an illegal or an immoral act, but will leave the parties where it finds them, no matter how the illegality of the contract may be brought before it, whether by direct suit or by way of set-off. 3 Ga., 182; 11 Ib., 547; 21 Ib., 46; 41 Ib., 315.

3. Upon the third plea, the jury having found with the plaintiffs, and no question of law being involved therein, it is unnecessary to consider of it further.

Judgment reversed.

# POLK et al., commissioners, vs. JAMES, ordinary, et al.

- I. For a failure or refusal to perform or complete their duty on the part of the commissioners created in Douglas county by the act of 1870, for the purpose of laying off town lots, selling the same and applying the proceeds, whereby the county was injured, mandamus was a proper remedy.
- 2. An office is a public station or employment conferred by the appointment of the government. Any man is a public officer who is appointed by the government and has any duty to perform concerning the public. Nor does it matter that his authority or duty is confined to narrow limits.
- 3. The commissioners of roads and revenues of Douglas county were authorized to proceed against any county officer having the care of public money for the purpose of bringing him to a settlement.

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- 4. The allegations in the petition for mandamus clearly showed a failure to discharge their official duty on the part of the defendants.
- 5. By the act of September 29th, 1881, the proviso which had authorized the continuance of this petition for mandamus having been repealed, no authority remained in the board to proceed further.

Officers. County Matters. Mandamus. Laws. Before Judge HARRIS. Douglas Superior Court. July Term, 1881.

Reported in the decision.

R. A MASSEY; T. W. LATHAM, for plaintiffs in error.

No appearance for defendants.

CRAWFORD, Justice.

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Ezekiel Polk et al., commissioners of roads and revenues of the county of Douglas, petitioned the judge of the superior court for said county, to grant them a mandamus nisi against John C. Bowdon et al., who under an act of the general assembly of Georgia of October 17th, 1870, had been appointed commissioners to purchase a tract of land at the place selected for a county-site, to lay off the same into town lots, sell them, and to apply the proceeds to the building of a court-house and jail for the said county.

The petition sets forth that the land was bought, divided into town lots and sold; that the amount received therefor was \$7,670.50 and that the contract price for building the court-house was \$5,500.00, and for the jail \$1,200.00; that the said commissioners have the same in hand, and refuse to pay it out as prescribed by law, or to account for the same. That there is a large sum due the contractors and builders of the court-house and jail, and their transferees, which sum is bearing interest at the rate of twelve per cent. per annum, and for which reason the holders thereof refuse to compel payment.

It is further set forth that there are some claims due

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for property sold which they refuse to collect, and some property unsold, which they refuse to sell. That petitioners, who are the legally constituted commissioners of roads and revenues for said county, have demanded that the money retained by the said commissioners be paid over to them or the county treasurer, which they also refuse. That they have applied \$1,000.00 to their own use, and \$500.00 to other purposes than the building of the courthouse and jail. That the amount collected and not properly paid out is \$3,700.00, and for which they refuse to account or settle.

The respondents demurred to the said petition for mandamus upon the following grounds in substance:

- (1.) Because the petioners have a specific legal remedy, and the rights they set up cannot be enforced by *mandamus*.
- (2.) Because the respondents are not officers and, therefore, the writ of *mandamus* does not lie against them, nor are the petitioners interested in the subject matter of said petition.
- (3.) If the respondents are officers, the allegations do not show any failure to discharge official duty from which a defect in legal justice will ensue.

The court below, after argument had, sustained the demurrer, dismissed the petition and quashed the proceeding. This ruling is the error alleged.

1. By act of the legislature of 1870, the ordinary of the county of Douglas, with four commissioners named, to wit: Jno. C. Bowdon et al., were appointed to do and perform the specific duties set out in the petition of Ezekiel Polk et al. These duties were certainly official, and should have been performed faithfully. The allegations are clear and distinct that they have not been so performed. The respondents, on demurrer, admit the truth of the allegations, but assert that petitioners have a specific legal remedy. That they have such remedy as is adequate to the end of making them fulfill all the duties imposed by the act aforesaid, we do not see.

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The duty assigned to these commissioners was one in which the public was interested; it involved the laying out of town lots, their sale, the collection of the money for the same, the building of a court-house and jail, the payment of the funds collected to the builders thereof, and our judgment is that there is no other specific legal remedy for their failure to discharge this statutory duty, and that mandamus lies to enforce it. 4 Ga., 26, 116; 5 Ib., 522; 12 Ib., 170; 26 Ib., 676.

2. But it is said that the respondents are not officers.

An office is a public station or employment conferred by the appointment of the government. And any man is a public officer who is appointed by government, and has any duty to perform concerning the public; nor is he any the less a public officer because his authority or duty is confined to narrow limits. (See Abbott, Jacob or Bouvier.) These respondents were appointed to discharge the particular duties mentioned in this petition by the legislature of the state, they accepted the appointment, and have partially discharged these duties, and we hold them to be officers under the law.

- 3. Another ground of demurrer is, that the petitioners are not interested in the subject matter of the petition. They are the legally constituted board of roads and revenues for the county of Douglas, and as such, among other things, have the examining and auditing the accounts of all officers having the care, management, collecting or disbursement of the money belonging to the county, or appropriated for its use or benefit, and in bringing them to a settlement. This shows that the petitioners are, as the guardians of the county funds, fully authorized to call the respondents to answer.
- 4. The last ground is that the allegations do not show any failure to discharge their official duty, from which a defect in legal justice will ensue.

The only statement necessary to meet this view of the case is to read the allegations, and it will appear that the defect in legal justice has already ensued.

#### Ferrell et al. vs. Hurst et al.

5. Since writing the opinion in this case, counsel for defendants in error, who was not present on the argument of the case, has called our attention to a local act of the legislature, approved September 29th, 1881, repealing the proviso which had authorized the continuance of this petition for mandamus, notwithstanding the repeal of the law appointing the commissioners of roads and revenues for Douglas county.

This repeal leaving the case without any authority in the board of commissioners to act for them in the premises, we can only affirm the judgment. We do this the more readily, because the act provides for the further prosecution of the rights of the county by requiring these commissioners to fulfill their duties, and report their actings and doings to the grand jury.

Judgment affirmed.

# FERRELL et al. vs. HURST et al.

- I. While a mistake in the name of a grantee of land from the state cannot be proved by parol when it is offered in evidence, yet where the grant described the grantee as "Ferrell" and the plat accompanying it described him as "Terrell," and each located him in a certain district, there was a patent ambiguity, and parol testimony was admissible to show that Ferrell was the name of the man living in that district, and that no such man as Terrell lived there.
- 2. For a like reason, a duly authenticated copy of the return of the drawing, made at the time, was admissible to show that Ferrell had been returned as the drawer of the land.
- 3. The charge of the court, as a whole, was correct, as was his refusal to charge as requested.
- 4. Whether an affidavit to attack the genuineness of a deed is such a defence as may be sworn to before a notary, where made out of the state, and such as may be attested by him without more. Quare?
- 5. We find no material error in the rulings of the court, and as under the evidence there must necessarily be a verdict similar to that rendered, the grant of a new trial was error.

### Ferrell et al. vs. Hurst et al.

Evidence. New Trial. Charge of Court. Deeds. Grants. Before Judge FLEMING. Worth Superior Court. April Term, 1881.

Reported in the decision.

WARREN & HOBBS, for plaintiffs in error.

D. A. VASON; D. H. POPE, for defendants.

JACKSON, Chief Justice.

This suit was brought to recover a lot of land in the county of Worth, by the heirs at law of Cuthbert Ferrell, against Hurst and Andrews. Under the charge of the court, the jury found for the plaintiffs. The defendants made a motion for a new trial, which was granted, and the plaintiffs excepted. The pleas are, not guilty, and seven years' adverse possession under color of title. According to the testimony, the defendants went into possession in 1869, and as the suit was brought in 1871, the defendants fail to show title by prescription, so that the issue is narrowed to the point whether the plaintiffs show title from the state to their ancestor. Their ancestor is Cuthert Ferrell. and if the grant of the state to this lot of land was made to him, the plaintiffs are entitled to recover. Whether made to him or to Cuthbert Terrell was really the contest in the court below, and the motion for new trial, which is based upon alleged errors of the judge in admitting and rejecting testimony, and in charging the jury in respect to the plat and grant, must have been granted by the court on what he considered an error he had committed on some of these points; for, if the evidence was properly in, and if all was in that ought to have been admitted, the verdict must be right, for the reason that the grant passed the title to the immediate ancestor of these plaintiffs, and that title, on his death, descended to them.

Is there error in these rulings, or any of them?

### Ferrell et al. vs. Hurst et al.

I. The court admitted parol evidence, to throw light on a patent ambiguity in the plat and grant. In the plat attached to and accompanying the grant the grantee's name is plainly written Cuthbert Ferrell; in the grant itself, it is written Cuthbert Terrell, in one part plainly, but in another with a somewhat peculiar twirl about the T, but not such a mark as indicates clearly the letter F, or changes the T to an F with absolute certainty. The parol proof was, that no such person as Cuthbert Terrell lived in Kennedy district, Jasper county, at the time of the drawing, but Cuthbert Ferrell did, and both grant and plat located the drawer as of that district and county. This testimony is uncontradicted, and shows that the plaintiffs' ancestor was the fortunate drawer, and the ambiguity or doubt arising on the face of the plat and grant—one having him clearly Ferrell and the other apparently Terrellmust be solved in favor of Ferrell, for the simple reason that such a person lived where this true drawer and grantee lived, and cannot be solved in favor of Terrell, because no such human being was there, or thereabouts, anywhere about that time.

The Code, section 3801, declares, that "parol evidence is admissible to explain all ambiguities, both latent and patent." This is an ambiguity patent on the face of the plat and grant, and under this section, unless some other law forbids, it may be explained by parol evidence. To explain, is to make plain and clear, to relieve from obscurity or doubt. The doubt is, to whom is this land granted—to Ferrell or Terrell. The doubt arises on the papers, from the fact that in one place it is Ferrell, in the other Terrell. To relieve the plat and grant of this ambiguity, parol evidence is admissible. 16 Ga., 521; 24 Ib., 338; 25 Ib., 141; 27 Ib., 58; 32 Ib., 348; 38 Ib., 648.

But it is said that another section of the Code conflicts with this. Section 2361 declares that a mistake in the name of the grantee cannot be proved by parol, and sections 2353 et seq., declare how errors in issuing and

### Ferrell et al. ve. Hurst et al.

recording grants may be corrected, and among them, "error in the name or residence of the grantee." It is conceded that the lines of correcting mistakes in the name of the grantee and explaining ambiguities in relation to that name, run close to each other, yet we think that there is space enough between them to be discerned. take or error such as the last cited sections refer to, there is no ambiguity about the name, but there is a clear mistake to be corrected. In an ambiguity, there is doubt as to the name intended to be written, either from obscurity in the penmanship, or the name being written differently in different parts of the paper. These two sections, or clauses of sections of the Code, must be construed together, and so that both may stand if possible, and neither destroy the other; and so endeavoring to construe them, we think where the name appears one in the grant and another in the plat accompanying and attached to it, and a part of it, and the difference in the two consists only in the first letter, and that letter differing only in the absence of one little stroke of the pen, this parol evidence was admissible to show that, by the residence at the time of the drawing, F was meant in all the paper rather than T. and that Ferrell, not Terrell, was the grantee.

- 2. But the court also admitted a copy of the record in the secretary of state's office, under the certificate of that officer, that Cuthbert Ferrell was therein returned as the fortunate drawer, and that he resided in Kennedy's district, Jasper county. If parol testimony threw light on the ambiguity, this cotemporaneous writing threw stronger rays upon it; and the copy of the record, so certified, is admissible in any court, if it does throw light on the case. Code, §\$83, 3816, 3817.
- 3. From these views in regard to the admissibility and effect of the parol and record evidence above considered, it follows that the refusal to charge to the effect that the inquiry of the jury should be confined to the grant alone, without reference to the plat, was not error, but accords

### Ferrell et al, vs. Hurst et al.

with our view of the law of the case, and that the charge of the court, taken as a whole, is substantially correct in the judgment of this court.

4. And this leaves for our consideration only the questions arising on the defendants' testimony. The plaintiffs attacked one of their deeds for forgery, and the affidavit was made in the state of Mississippi and before a justice of the peace there. There was no authentication by any other officer of Mississippi that this officer was a justice of the peace, and one question made is this: is such authentication necessary under the act of 1870, codified in section 3450? That section reads: "All pleas or defenses, in any court of this state, which have to be filed under oath, shall be held to be sufficiently verified when the same are sworn to before any notary, justice of the peace, etc., of the state or county where the oath is made, etc.; and such oath, so made, shall have the same force and effect as if it had been made before an officer of this state. authorized to administer the same. The official attestation of the officer before whom the oath or affidavit may be made, shall be prima facie evidence of the official character of such officer, and that he was authorized to administer oaths."

While this affidavit was rather an attack on defendants' defenses than a defense in the sense of this act, and therefore, perhaps, improperly admitted by the court, to open the attack on one link of their chain of title, we do not see how it hurt them, for the reason that the deed so attacked was rejected by the court because it was, from its very appearance, not an ancient deed, over thirty years old. Code, §2700. Under that section, it was for the court to pass upon its appearance, and not having it before us, we cannot say that his judgment thereon was wrong.

Besides, this attack seems confined to registered deeds by the Code, section 2712, and this was not, so far as appears from the record, a registered deed, but was offered as an ancient deed which proved itself without registration

## Lockridge vs. Lyon.

5. On what ground the court granted the new trial, the record does not disclose; and as we see no material error in his rulings on the law, and if the testimony was all properly admitted, there is plenty to sustain and require the verdict, we must uphold it, and reverse the judgment which set it aside and awarded the new trial.

Judgment reversed.

# LOCKRIDGE vs. LYON.

That a judgment is a nullity by reason of having been rendered against a defendant after his death, or rendered on two verdicts, one in favor of the plaintiff, the other for the defendant, does not require the interposition of a court of equity by injunction; if such be the facts, they can be taken advantage of by affidavit of illegality or motion to set aside the judgment.

Injunction. Equity. Judgments. Parties. Before Judge FAIN. Bartow Superior Court. November Adjourned Term, 1881.

Reported in the decision.

M. R. STANSELL, for plaintiff in error.

R. B. TRIPPE; J. M. NEAL, for defendant.

JACKSON, Chief Justice.

The allegations in this bill make a case where it is charged that the judgment sought to be enjoined is void, because it was rendered when the complainant's testator was not a party, being dead, and because there are two verdicts on which it appears to have been rendered, one for plaintiff, and the other for defendant.

If either be well founded in fact and law, the remedy at law, whenever the threat to levy on testator's property is carried into execution, is adequate and complete, and Crine & Daniel vs. Davis, receiver.

there is no necessity for the interposition of equity by injunction. An affidavit of illegality will make the points just as fully and clearly, and the relief of a court of law will be just as effectual.

Or, without and before levy, a motion to set aside the judgment for the reasons set out in the bill will present the issues, and settle all rights as well. The injunction, therefore, was properly refused, and it becomes unnecessary to look for other grounds on which to affirm the judgment which denied the writ of injunction.

Judgment affirmed.

# CRINE & DANIEL, vs. DAVIS, receiver.

Factors who held a chattel mortgage agreed with a landlord that if he would rent land to the mortgagor their mortgage should not interfere with the collection of his rent, that it should be paid, and that they would make advances to the tenant to run the farm; and upon the faith of these assurances the landlord rented; but subsequently the factors threatened a foreclosure of their mortgage, the tenant began to remove, the mortgage was foreclosed, and a distress warrant was issued:

Held, that the mortgagees were estopped from claiming the fund in the hands of the sheriff to the exclusion of the distress warrant. And on a money rule an answer by the landlord setting up the above facts was not demurrable.

(a.) A receiver who took charge of the property of the factors was in no better situation than they themselves.

Mortgages. Contracts. Estoppel. Receivers. Before Judge FLEMING. Dougherty Superior Court. April Term, 1881.

Reported in the decision.

C. B. WOOTEN; L. ARNHEIM, for plaintiff in error.

WRIGHT & POPE, for defendant.

### Crine & Daniel vs. Davis, receiver.

JACKSON, Chief Justice.

Certain goods of one Johnson were levied on by the sheriff, and one hundred and fifty-six dollars were held by him as the proceeds thereof. Davis, as receiver for Welch & Bacon, on a money rule against the sheriff, claimed this fund on a mortgage given to Welch & Bacon, and Crine & Daniel claimed it on a distress for rent. The mortgage was older than the distress for rent, but Crine & Daniel put in the following allegations on which they claimed the money:

"And now come respondents M. Crine and C. J. Daniel, using the firm name of Crine & Daniel, and in answer to the rule nisi served upon them in the case above stated say, that they claim the money referred to in said rule under and by virtue of a distress warrant sued out by them against the said Jas. Johnson and one Peter Austin, returnable to the April term of the superior court of said county, 1881. That said distress warrant is based upon the contract for the rent of the Crine & Daniel place, situated on the east side of Flint river for the year of 1881, which said contract was dated December 20th, 1880, whereby the said Jas. Johnson and Peter Austin undertook and promised to pay respondents 14 bales of lint cotton, to class low middling, and said cotton to be picked, packed and delivered to said Crine & Daniel in Albany, Ga., which said cotton is of the value of six hundred and thirty dollars; and respondents further answering say, that before and at the time of entering into said contract of rent with the said Johnson & Austin, respondents had an agreement and understanding with Welch & Bacon, the payees in said mortgage, in which the said Welch & Bacon, in consideration that respondents would enter into said contract of rent, agreed and promised respondents that their said mortgage should in no case interfere with them in the collection of their rent; the said Welch & Bacon urged the respondents to rent said place to said Johnson

## Crine & Daniel us. Davis, receiver.

& Austin, saying that they would not break them up. but would run them and see the rent paid, and that no claim of theirs should come in conflict with respondents' claim for rent; and that upon the faith of this promise and assurance of Welch & Bacon, respondents did rent said place as aforesaid. Respondents show further that said tenants were seeking to remove and were actually removing their goods from the premises, and because the said Welch & Bacon and their successor, the said Ino. A. Davis, receiver aforesaid, refused to run them and threatened to foreclose their mortgage aforesaid against them in violation of their agreement aforesaid; and that thereupon respondents sued out their distress warrant and caused the same to be levied upon the property of said tenants; and that the said receiver who stands in the place of Welch & Bacon, as aforesaid, had proceeded to foreclose said mortgage; and that the property levied upon under said mortgage foreclosure is the property levied upon by virtue of respondents' distress warrant. They insist that the said Welch & Bacon, and the said receiver who is their successor, and who received said mortgage after the maturity thereof, are estopped from setting up said mortgage in opposition to respondents' claim for rent."

Attorneys for John A. Davis, receiver, demurred to the respondents' answer. The court sustained the demurrer, ordering the money to be paid over to John A. Davis, receiver, and this is the error complained of, which this court is asked to review.

The plaintiffs in error were induced by Welch & Bacon, according to the allegations of this answer, to rent this place to Johnson, by a promise on their part that this mort gage should not interfere with their collection of rent for it—that they would pay the rent or see it paid, and on this assurance the plaintiffs in error let Johnson have their land, with the further promise that they would not press the mortgage, but advance to Johnson so as to enable him to run the place; that so far from advancing to

him, the mortgage was foreclosed, and this induced Johnson to move off the goods from the place and necessitated the levy of the distress warrant for the rent.

Was there a consideration moving between Welch & Bacon and the plaintiffs in error to support this contract? A consideration is valid if any benefit accrues to him who makes the promise or any injury to him who receives it. Code, \$2740. In this case there are both ingredients. Welch & Bacon were benefited in that they got to advance and sell Johnson supplies for farming the land rented; and as he was already their mortgage debtor, it was to their interest further to help him work to be more able to pay them; and on the other hand injury would accrue to plaintiffs in error from the contract being broken.

The contract being thus supported by ample consideration, does it estop Welch & Bacon from going right in its teeth, and letting the mortgage take this money over the rent? On every principle of right and equity it must have that effect as to them. Code, §3753; 12 Ib., 52; 51 Ga., 80, 81, division of opinion, 2.

Does Davis, receiver for them, stand in any better position than they occupied? Clearly not. He receives for them to pay with this fund their creditors, but if it be not their fund, but belongs by their contract to plaintiffs in error, what right have they or their creditors or their receiver to it? We are unable to see any right or equity in such a claim. 37 Ga., 619,

Judgment reversed.

## MORTON vs. MURRELL et al.

- The courts are not inclined to construe a legacy to be specific, where the question is in doubt.
- The cardinal rule of construction of wills is to seek the intention of the testator.
- 3. A testator made the following provisions in his will: After providing for the payment of his debts, he bequeathed certain specified property to his wife for life, and at her death to be equally divided

between his three children. He declared that he had given to his son, W. H. M., property which he valued at \$10,000. He left to his other two children, share and share alike, certain land and all the money and evidences of debt of which he might die possessed, after paying physicians' bills and funeral expenses. By a codicil, he declared that, having given to his other two children each \$1,500.00, he then bequeathed unto his said son \$1,500.00 "to be raised out of my estate before the final division between him and his brother and sister," after the death of the wife; but should testator before his death give said son \$1,500.00 and take his receipt therefor, the legacy was to become veid, as it was declared to be made to equalize the children:

Held, that the legacy was general. not specific, and would have to contribute to the payment of debts with the other general legacies.

Wills. Legacies. Before Judge ERWIN. Clarke Superior Court. May Term, 1881.

Reported in the decision.

POPE BARROW, for plaintiff in error.

JACKSON & THOMAS, for defendants.

SPEER, Justice.

Joseph F. Morton, of the county of Clarke, died in the year 187—, testate, leaving a will and codicil of which the following are copies, and which were duly proved and admitted to record:

"GEORGIA-Clarke County.

In the name of God, Amen. I, Joseph F. Morton, of the county and state aforesaid, do make, publish and declare this to be my last will and testament, hereby revoking all wills by me heretofore made.

Item 1st. I commend my soul to God, who gave it, and my body to my family and friends, to be buried in a plain, decent manner.

Item 2d. I wish all my just debts (if any) paid.

Item 3d. I give and bequeath unto my beloved wife, Mildred E. Morton, the homestead on Shoal Creek, in said county, and also on Big Creek, containing two thousand one hundred acres, more or less, with the appurtenances thereon, and also the stock of all kind, viz: horses, mules, cattle, hogs, sheep, etc., of which I may die seized and

possessed, also all my household and kitchen furniture, and also all the provisions and crops on hand at the time of my death, and the growing crop if unmatured at same time for and during her natural life, and at her death to be disposed of as hereinafter provided, giving to my wife full power and authority at any time to sell, dispose of or exchange any of the stock at her option and discretion.

Item 4th. I have already given my son, William Henry Morton, property which I value at ten thousand dollars.

Item 5th. I give and bequeathe unto my son, Clinton Parks Morton, and my daughter, Leila Wade Morton, equally, the Lampkin and Thomas tracts of land on the waters of Trail and Shoal creeks in said county, containing fourteen hundred acres, more or less, and all money and evidences of debt of which I may die seized and possessed, after paying physicians' bills and funeral expenses, to be equally divided between them, share and share alike.

Item 6th. At the death of my wife I give and bequeath unto my three children, Clinton Parks, William Henry, and Leila Wade, all the land and property of every kind left by her to be equally divided between them, share and share alike.

Item 7th. I hereby nominate and appoint Mildred E. Morton, executrix of this my last will and testament, hereby exempting her from making inventory or appraisement, or making any return whatever. In testimony whereof, I, the said Joseph F. Morton, have hereunto set my hand and seal. This twelfth day of July, 1873.

J. F. MORTON, [Seal.]"

## "STATE OF GEORGIA-Clarke County.

In the name of God, Amen. I, Joseph F. Morton, being of sound and disposing mind and memory, do make, ordain, publish and declare this to be a codicil to this my last will and testament.

Item 1st. Having valued the property given to my son, William Henry Morton, at a full valuation, and having given my son, Clinton Parks Morton, and my daughter, Leila Wade Morton, each fifteen hundred dollars, I now give and bequeath unto my said son, William Henry Morton, the additional sum of fifteen hundred dollars to be raised out of my estate and paid to him before the final division between him and his brother and sister, as provided for in the sixth item of my last will and testament, and after that the division to be equal between them as therein stated. But if I pay or give to my said son, William Henry Morton, before my death the said sum of fifteen hundred dollars and take his receipt therefor, then this bequest to be void, as I make it to make my children equal and to guard (against) any sudden demise should I die before I give my said son, William Henry Morton, the sum of fifteen hundred dollars. In testimony, etc., etc. 21st December, 1874."

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Mrs. Mildred E. Morton, the nominated executrix, duly qualified under said will and assumed the duty of executing the same.

In March, 1879, Leila Wade Murrell (formerly Morton) and her husband, George T. Murrell, and Clinton Parks Morton, filed their bill in Clarke superior court for settlement, relief and discovery against the executrix, Mildred E. Morton, and William Henry Morton.

The object of the bill appears to have been originally to have a settlement of the estate of the testator and an accounting on the part of the executrix; but so far as the case was presented and argued here, there is but one question presented for our consideration and judgment. The facts were agreed upon, and the chancellor it was consented should render his decree upon those facts. agreed that at the time of testator's death he was indebted, over and above physician's bills and funeral expenses, in the sum of thirteen hundred and eighty-nine dollars and forty cents; that the residuum of assets in the hands of the executrix not disposed of by the will, amounted to three hundred and seventy-five dollars, and which when applied to the debts left the sum of one thousand and fourteen dollars and forty cents to be paid out of the general legacies under the will.

Complainants below insisted that the legacy of fifteen hundred dollars given to William Henry Morton was a general legacy, and subject to contribute its pro rata share to the discharge of said indebtedness, and as said indebtedness had been paid out of the assets, such as money, notes, etc., bequeathed to them, they seek a decree that before said legacy of fifteen hundred dollars to William Henry Morton is paid, the same should abate by the sum of three hundred and thirty-eight dollars and fifteen cents in their favor, that being the proportion that has been paid out of these legacies for the benefit of said William H. Morton. William Henry insists that his legacy is not subject to abate, that it is in the nature of a specific legacy, and is

entitled to be paid in full, and is not primarily chargeable with the debts of the estate. Under this statement of facts the case was submitted to the court without the intervention of a jury, who decreed in favor of the complainants below, that the legacy of \$1,500.00 bequeathed was chargeable with its pro rata share of said indebtedness and should abate accordingly. To this decision plaintiff in error excepted, and assigns the same as error.

Whether the ruling of the court was right depends upon the construction of the will, under which both parties assert their rights. The cardinal rule touching the construction of legacies is "for the court to seek diligently for the intention of the testator and to give effect to the same so far as it may be consistent with the rules of law."

The testator in the second item desires all his just debts (if any) to be paid. In the fifth item he gives to his son, C. P. Morton, and his daughter, Leila Wade Morton, his lands on the waters of Trail and Shoal creeks, "and all moneys and evidences of debt of which he may die seized and possessed, after paying physicians' bills and funeral expenses, to be equally divided between them, share and share alike." It is manifest that as to this class of debts, physicians' bills and funeral expenses, he intended to charge their payment upon this bequest to these two children.

By the fourth item he declares that he "has already given to William Henry Morton property to the value of ten thousand dollars," and by the will nothing further is given him except an equal interest in remainder with the other two children in the property given to the wife during her natural life, as found in the third item. Such are the terms of the will executed on the twelfth day of July, 1873. But on the 21st of December, 1874, he executes a codicil, and his reason for so doing is evident. He declares in the codicil: "Having given to my son, William Henry Morton, property at a full valuation, and having given my son, Clinton Parks Morton, and my daughter,

Leila Wade Morton, each fifteen hundred dollars, I now give and bequeath to my son, William Henry Morton, the additional sum of fifteen hundred dollars to be raised out of my estate and paid to him before the final division between him and his brother and sister as provided for in the sixth item of my last will and testament, and after that the division to be equal between them, as therein stated. But if I pay or give to my son, William Henry Morton before my death the said sum of fifteen hundred dollars and take his receipt therefor, then this bequest to be void, as I made it to make my children equal, and to guard against any sudden demise should I die before I give my said son William Henry Morton, the sum of fifteen hundred dollars."

It is very clear that the testamentary scheme of the testator, both as to present as well as the prospective interests he was disposing of, that equality among his children was a paramount and controlling purpose. It is fair to presume that after the making of the will he advanced to his other two children each the sum of fifteen hundred dollars, and the codicil is evidently executed with a view to restore equality to William Henry in his estate by reason of this gift. The question is then, what is the nature of the legacy to him under this codicil? Is it a general legacy? or is it in the nature of a specific legacy, and not subject to abate with general legacies to pay debts?

The codicil declares that the \$1,500.00 are to be raised out of his estate, and to be paid to him before the final distribution takes place as provided for in the sixth item of the will.

Counsel for plaintiff in error insists that this is a legacy in the nature of a specific legacy. This was called by the civilians a demonstrative legacy, and did not abate as general legacies to the payment of debts. But our Code declares "that a gift of money to be paid from a specified fund is nevertheless a general legacy." Code, §2458. The courts in general are averse to construing legacies to be

specific, and the intention of the testator with reference to the thing bequeathed must be clear. 2 Wms. on Exrs., 996; 4 Ves., 748; 4 Ib., 568; 8 Ib., 413. Neither will a money legacy be rendered specific by its postponement until a particular investment of a fund takes place, as where a bequest is to A and B of £1000 each, "which legacies I direct to be paid as soon as my property in India shall be realized in England." 2 Wms. Exrs., 996; 8 Ves., 617; 6 Ves., 199.

"A specific legacy is one which operates on property particularly designated." Here the legacy "is to be raised from his estate," no particular property being designated But apart from these views and authorities, we are satisfied the testamentary scheme of the testator was equality in his bounty to his children. His language on this point cannot be misunderstood. The codicil was but the offspring of this testamentary intent. This purpose the courts should never disappoint, when it is clear, and under its guidance wills should be so construed as to give effect to every part. 28 Ga., 377. And they always lean to such construction as will dispose of the property in accordance with the statute of distributions. 27 Geo., 324. To hold that the legacy of plaintiff in error under this codicil is specific will be to disappoint the intent expressed in the same paper, which declares his purpose in making it "is to make his children equal.".

We see, therefore, no error in the judgment and decree of the court as pronounced by him.

Judgment affirmed.

Sharman, sheriff, for use, ve. Walker.

# SHARMAN, sheriff, for use, vs. WALKER.

[SPEER, Justice, being disqualified in this case, Judge Underwood, of the Rome circuit, was appointed to preside in his stead.]

- I. Where a purchaser at a sheriff's sale fails to comply with his bid, the sheriff may sue him for the amount thereof, or may re-sell the property and sue him for the difference between the original bid and what the property brings at the second sale.
- 2. In such a suit, the sheriff is the party plaintiff, and parties interested in the fund are properly joined as usees in the action; nor is there any misjoinder because the sale took place under two mortgage f. fas., the plaintiffs in both of which are made usees of the sheriff's suit.

Sheriff. Parties. Pleadings. Non-Suit. Before Judge SIMMONS. Crawford Superior Court. March Term, 1881.

Reported in the decision.

J. A. HUNT; R. P. TRIPPE; R. D. SMITH, for plaintiff in error.

HALL & SON; W. S. WALLACE; BACON & RUTHER-FORD, for defendant.

UNDERWOOD, Judge.

This is a suit at law, commenced by the plaintiff in the court below as sheriff of the county of Crawford, for the use of James M. Smith and Peter W. Alexander, who were severally plaintiffs in two separate mortgage fi. fas. issued from judgments of foreclosure, being of the same date. At the sale of the mortgaged property, which was the same in each mortgage, the defendant in error bid off the property, in two parcels, at the aggregate sum of \$15,466.00. The bidder failed to comply with the terms of the sale, and pay the bid when it was demanded by the sheriff. On the same day, under the provisions of section

Sharman, sheriff, for use, vs. Walker.

3655 of the Code of 1873, the property was re-sold, and was bid off by John C. Zorne and William T. Respass, in separate parcels, for the aggregate sum of \$9,155.00, making a difference between the two sales of \$6,311, for which sum the suit was brought.

These facts were properly set forth in the declaration. The defendant demurred to the plaintiff's declaration on the trial, and moved to non-suit said case, on the ground that there was a misjoinder of plaintiffs and causes of action; and after argument and consideration by the court, a non-suit was awarded upon the grounds aforesaid, unless the plaintiff should see proper to amend the said suit by striking from the declaration one of said plaintiffs, which was declined. The case was dismissed, and the plaintiff excepted.

The plaintiff in error relies upon the case in 31 Ga., 393, Glenn vs. Black et al.

The fifth head-note of the case is in these words: "It is not a misjoinder in such an action to introduce as usees of the plaintiff several plaintiffs in execution, whose interest is of the same nature, and who all claim a participation in the fund sued for; and if any such be omitted by mistake, or accidentally, the omission may be supplied by an amendment." This was a case in favor of the sheriff, Black, to recover from Glenn the amount of his bid, for the use of several different plaintiffs in f. fa., and a motion was made to amend by adding other plaintiffs in f. fas., as usees of the plaintiff, the sheriff.

Judge Jenkins, speaking for the court, says on page 398:
"The plaintiff, at the trial term, moved to amend the declaration by adding other usees than those originally named in it. This amendment neither introduced a new cause of action, nor in any way varied the liability of the defendant. Technically speaking, it did not change the party plaintiff. The sheriff is the party plaintiff. With him the contract set out in the declaration was made. The

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usees are introduced to show, in the language of the statute, who is, or are, interested in the enforcement of the It was argued that there was, by this contract. amendment, a misjoinder of plaintiffs. But there was in reality but one plaintiff, namely, the sheriff. party authorized to sue, He has discretion in such cases, either to proceed against the recusant purchaser for the whole amount of his bid, or to re-sell the property, and hold him liable for any loss that may result. can be but one recovery for such failure, or refusal, to comply with the terms of sale; and as the act provides that the sheriff shall sue for the use of the party interested, all persons so interested should be joined as usees. The money recovered, if any, goes into the sheriff's hands, and he is subject to the order of the court in distributing it among the usees. The amendment was properly allowed."

Misjoinder of plaintiffs and causes of action was the very identical question in the case, and the extract quoted distinctly and clearly decides both,—that the sheriff is the party; that there may be as many usees as there are persons interested; that there can be but one recovery; that the cause of action arises on the contract with the sheriff, by making the bid and failure or refusal to comply with the terms of sale when requested so to do by the sheriff. This decision in 31 Ga., we affirm. We might stop here.

It is insisted by the very learned and able counsel for the defendant in error, "that there is a case in 12 Ga., 189, The Governor, for the use of G. W. Moore and M. H. Myrick, vs. Hicks et al., in conflict with the case in 31 Ga., 393, just quoted, and that the case in 12 Ga., 393, was decided in 1852, before the statute of 1858, which it is contended made the decisions of the supreme court the law to the same extent as if enacted into a statute, and, therefore, that the case in 12 Ga. is the law and controls this case."

For the sake of this argument, let all this, except the conflict, be conceded. We suppose that the learned coun-

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Sharman, sheriff, for use, vs. Walker.

sel will not contend that the force of the statute of 1858 goes further than the decision in the particular case. does not enact into a statute the argument of the organ of the court delivering the opinion, and the reasons for the opinion. The case in 12 Ga. was an action of debt on a sheriff's bond, for the use of G. W. Moore and M. H. Myrick and Moore & Myrick, three separate and distinct plaintiffs, suing in the name of the governor for their use severally. The declaration stated that one of the plaintiffs, George Moore, recovered \$928.98, principal, and \$68.03, interest, besides cost, in November, 1842, on an attachment against Elkanah Sawyer and Littleberry Boon: that Matthew H. Myrick, another plaintiff, recovered, at the same time, of Elkanah Sawyer, a judgment for \$747.41, principal, and \$54.81, interest, besides cost; and that Moore & Myrick, purchased jointly and took by assignment to Myrick, for the use of himself and Moore, a fi. fa. against Sawver and Boon, from one Littleberry Lucas, dated in August, 1842, for \$1,278.00, principal, and \$65.44 interest, besides cost. The breach alleged was that Hicks, the sheriff, sold the property of Sawyer, the defendant, to the amount of \$3,600.00 on these several executions; that, by a verdict by a jury upon a collateral issue, there was found to be still in the sheriff's hands \$1,024.06 of the proceeds of the sale of the defendant's property, unaccounted for. Upon this statement of facts, the action was brought upon the bond and the failure of the sheriff to pay over that money. At the trial, the declaration was demurred to. One ground was misjoinder of plaintiffs and several causes of action in the same writ. The court sustained the demurrer, but allowed the party to amend, which he declined to do, and the case was dismissed. Judge Lumpkin, the organ of the court, said: "That the objection was well taken, and fatal. Courts will not in one suit take cognizance of distinct and separate claims of different persons; where the damage as well as the interest is several, each party injured must, in that case, sue separately."

Echols vs. Head & Co.

We hold that the decision in that case, affirming the case, as applied to the facts of that case, is good law. We think there is a clear distinction between the case in 12 Ga. and the case in 31 Ga.

The case in 12 Ga. was an action of debt. There was no privity between the plaintiffs; there was no community of interest; each party injured could have maintained a separate suit for his interest until the penalty of the bond was exhausted. The priority and dignity of the several claims and the apportionment of the fund to them, could not properly have been made in that suit.

The case in 31 Ga. was in the nature of action of assumpsit, arising upon the contract made with the sheriff by the bid, in which all plaintiffs in judgment were alike interested. There could be but one recovery on that contract, and those who were not parties to the suit could not participate in the fund recovered. The sheriff was under the direction and control of the court. It was his duty to sue and bring the money into court, when recovered, for distribution.

We therefore reverse the ruling of the court below in this case, awarding a non-suit and dismissing the case, and direct the same to be reinstated.

Judgment reversed.

## ECHOLS vs. HEAD & COMPANY.

There is no vendor's lien in Georgia. The right to attach for purchase money is a privilege, not a lien.

(a.) Therefore, a note with personal security having been given for the purchase money of a horse, that the vendor subsequently bought back the horse and thereby destroyed his right to attach, did not release the surety on the note.

Principal and Surety. Liens. Attachment. Vendor and Purchaser. Before Judge ERWIN. Clarke Superior Court. May Term, 1881.

Reported in the decision.

### Echols vs. Head & Co.

- J. W. ECHOLS; POPE BARROW, for plaintiff in error.
- S. P. THOMAS; L. W. THOMAS, for defendant.

SPEER, Justice.

Head & Co., brought their suit on a note in a justice's court against John Austin, as principal, and Joseph H. Echols, security. An appeal was taken by Echols from the justice's court to the superior court. Under the charge of the court and evidence submitted, a verdict was had in favor of the plaintiffs. Defendant Echols made a motion for a new trial, which was refused by the Court, and he excepted.

The ground of complaint relied upon in this Court was an alleged error in the charge of the court in the following language:

"The defendant, Echols, further insists that he has been discharged from all liability on said note by the act of the creditor in buying back the horse in question from the principal debtor, Austin, for the reason that the right of attachment for the purchase money was thereby desstroyed by the act of the creditor, and insists that his right of attachment was a security for the collection of the debt which the creditor was bound to hold for the benefit of the surety, would perhaps be sound if this right of attaching for the purchase money gave the creditor a prior lien upon the property attached, to the exclusion of other liens of older date than the levy of the attachment. But inasmuch as this lien dates only from the date of the levy of the attachment, this right is not such a security as the law means when it provides for the discharge of a surety by the surrender of a security held by the creditor. The act therefore of the creditor in buying back this horse from the principal, if he did so, is not such an act as would discharge the surety, upon the ground that the holder of the note has discharged

#### Echols vs. Head & Co.

or surrendered a security which he held for the payment of the debt."

After carefully looking through the record and the evidence submitted, we are of opinion that the charge of the court was correct, and the law of the case under the proofs submitted.

The view insisted upon by the counsel for plaintiff in error, and so earnestly pressed, is, that inasmuch as these defendants in error purchased of the principal, Austin, the horse which was the consideration for the note sued on. they thereby deprived themselves of the legal right to sue out an attachment for the purchase money against the property, and this was an act that increased the risk of the security and discharged him. The error of this view consists in the fact that under our law a vendor has no lien for the purchase money, on personalty, superior to older liens. The law gives him the right to attach for the purchase money, but no preferred lien is given him that gives him a priority. There was no security surrendered here, for the law gave him none. The case relied upon by counsel from the Louisiana Reports would be in point if a creditor had a lien for the purchase money in this state, as they have in Louisiana. There, such a transaction was held to discharge the surety, because he surrendered in the re-purchase of the property the lien which the law gave him, and which he was bound to hold for the protection of the security, as well as for himself. The failure of a creditor to preserve a lien which he had on property of the principal debtor was held to discharge a surety. For instance, where a creditor failed to record a mortgage within the time prescribed it was held to operate as a discharge of the surety. 27 Ga., 428. But a mere failure by the creditor to sue as soon as the law allows, or negligence to prosecute with vigor his legal remedies, unless for a consideration, will not release the surety. Code, §2154.

If sureties desire a creditor to be diligent the law clothes

### Tompkins vs. Phipps.

them with power to press him to his duty, and if he fails or refuses the surety is released. But mere delay to sue alone when he has not been notified brings no such relief.

Let the judgment below be affirmed.

## TOMPKINS 75. PHIPPS.

- τ. If a non-suit must necessarily have been awarded, although the reason assigned for its grant may have been wrong, yet the grant itself will be upheld.
- 2. Where an award on its face showed that it was rendered in Dougherty county, a f. fa. could not issue from Baker superior court founded thereon. In a claim case arising under such a f. fa., these facts appearing from the plaintiff's evidence, a motion to dismiss the levy would be sustained. The court having granted a non-suit, and the effect being the same, the ruling will be affirmed.

Arbitrament and Award. Jurisdiction. Executions. Non-suit. Before Judge FLEMING. Baker Superior Court. May Term, 1881.

Reported in the decision.

WARREN & HOBBS; D. A. VASON; W. E. SMITH, for plaintiff in error.

A. L. HAWES; O. G. GURLEY; D. H. POPE, for defendant.

SPEER, Justice.

This was a claim case pending in the superior court of Dougherty county. Plaintiff in error, on the trial, read in evidence to the jury a fi. fa. issuing from the superior court of Baker county in favor of plaintiff vs. Littleton Phipps, dated 26th June, 1874, for the principal sum of seven hundred and eighty seven dollars and six cents principal, besides interest and costs, with the entry of

Tompkins vs. Phipps.

levies thereon, and proved the defendant in fi. fa. was in possession of the property levied on at the date of the fi. fa. and up to 1874 or 1875, at his death. He also offered in evidence a certified copy of the award and judgment in the case, of which the following is a copy, upon which the fi. fa. issued:

"GEORGIA-Dougherty county:

ALBANY, June 20th, 1873.

In the arbitration between Littleton Phipps, E. Tompkins and H. I. Cook & Son, submitted to us as arbitrators, after hearing the evidence submitted to us, we award that there is a balance due to Eubanks Tompkins by Littleton Phipps, after payment and extinguishment of all demands against said Eubanks Tompkins in favor of Littleton Phipps, as submitted to us, the sum of eleven hundred and fifty-six dollars and seventy-eight cents, with interest from the first day of January, 1870, which said sum we award that the said Eubanks Tompkins recover of the said Littleton Phipps, together with all costs; and we further award, there is due, and owing to Hamlin J. Cook & Son, on account of advances made by them for said Eubanks Tompkins, on the faith of the rent of the place of said Eubanks Tompkins, in the hands of the said Littleton Phipps for the year 1869, the sum of three hundred and sixty dollars and thirty cents, and that the said Cook & Son recover of said Phipps the said sum, with interest from 20th September, 1869, and that the sum be a credit in their favor in the amount stated, balance in favor of Eubanks Tompkins, after deducting said sum due to said Eubanks Tompkins, to be recovered by him out of the said Littleton Phipps, the sum of seven hundred and eighty-seven dollars and six cents, with interest from 1st January, 1870. As to compensation to us, as arbitrators for our service, we award ourselves the sum of one hundred dollars, each, to be divided and paid by the said Eubanks Tompkins and Littleton Phipps, respectively, which amount was agreed to by counsel for the parties as reasonable and just. RICHARD F. LYON.

JOHN A. DAVIS,

Arbitrators."

Plaintiff in fi. fa. having closed his case, counsel for claimant then moved for a non-suit, upon the ground that the fi. fa. in this case, does not follow the judgment in this, to-wit: that the award and judgment gave Tompkins a judgment vs. Phipps for \$1,156.75, and the fi. fa. is

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for a less sum, to-wit, the sum of \$787.60; which motion was sustained by the court, and plaintiff excepted.

In the argument before this court, counsel for defendant insisted that the judgment of the court in non-suiting plaintiff was right, even though the ground upon which the same was rendered was error, because they allege by the record, it appears that the fi. fa. levied issued from the superior court of Baker county, and the award shows upon its face it was made in the county of Dougherty, and it does not appear that there was any case pending in Baker county to authorize it to be entered and made the judgment of the court in Baker county, from which the fi. fa. issued

Section 4242 of the Code provides: "After the arbitrators shall have made up their award, they shall furnish each of the parties with a copy thereof, and return the original award to the next superior court of the county where the award was made, and said award shall be entered on the minutes of said court." 61 Ga., 72.

From an inspection of this award, the same having been offered as the judgment on which the fi. fa. from Baker county issued, it appears that it was made in the county of Dougherty, and the statute required it be returned to, and entered and made the judgment of, the superior court of that county, and not of Baker county. Inasmuch as this point is fatal to the success of the cause of the plaintiff in error, as presented by this record, and must be fatal below, we can see no good reason to reverse the judgment complained of here, as set forth in the bill of exceptions, whether the ground upon which it was rendered was right or wrong. A reversal could not benefit him, if the record speaks the truth; and, therefore, without considering or adjudying the points made in the bill of exceptions, the judgment of the court below must be affirmed, on the ground that the record now before us discloses the fact that the award was made in the county of Dougherty, and the fi. fa. upon the same issued from

Zachry vs. Zachry.

the superior court of Baker county, and hence the judgment below non-suiting the plaintiff was right. It might have been more regular to have dismissed the levy, but the effect is the same.

Let the judgment be affirmed.

# ZACHRY vs. ZACHRY.

- Where a f. fa. is claiming money in the hands of a sheriff, no order is necessary to withdraw it in order to make another levy.
- The variance between a f. fa. and the judgment on which it is founded must be material, in order to be good as a ground of illegality.
- 3. A mere general allegation that a levy is excessive, with no facts showing such excessiveness stated, is not good as a ground of illegality, no disproportion between the f. fa. and the property on which it is levied being apparent.
- 4. That the land levied on does not belong to the defendant is no ground for an affidavit of illegality.
- 5. The description of the lots levied on in this case was by the numnumber of acres, the number of the lots, the number of the district, and name of the county, both as formerly and also as at present constituted, and was sufficient.
- 6. The bill of exceptions in this case being apparently sued out for delay only, ten per cent. damages are awarded.

Illegality. Executions. Practice in Superior Court. Levy and Sale. Practice in Supreme Court. Before Judge STEWART. Rockdale Superior Court. February Adjourned Term, 1881.

Reported in the decision.

A. C. McCalla, for plaintiff in error.

JNO. J. FLOYD, for defendant.

CRAWFORD, Justice.

1. This case arose upon an affidavit of illegality which was filed by A. B. Zachry to an execution against him in

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## Zachry vs. Zachry,

favor of Mattie J. Zachry. The first ground taken was, that certain property of his had been previously sold under this fi. fa., and that the funds arising from said sale were before the court for distribution under the claim of older and other judgment liens, which had been returned to the court; that the said fi. fa. had been taken and relevied without an order of the court.

The only return which is necessary to be made of an execution to claim money in the hands of the sheriff, is to deposit with him the fi. fa. It is insisted, however, that the same rule which governs claim cases is applicable to this, and that to make another levy an order of the court, withdrawing the execution, is necessary. We cannot so hold. Where a claim to the property levied is interposed, the law makes it the duty of the sheriff to return the execution, with the claim papers, to the proper court, that the right of property may be decided. But no such return is required where the sheriff holds several fi. fas., contesting with each other for the money in his hands; so that simply being in his hands with others to claim money, is no legal reason why an order of the court is necessary to proceed with it, if there be nothing else in the way.

- 2. The second ground is, that the fi. fa. does not follow the judgment, in this, that the judgment is against A. H. Zachry and L. H. Zachry, and the fi. fa. against A. H. and L. H. Zachry. The difference between the judgment and the fi. fa. must be material, otherwise it will be held good. The materiality here is not apparent.
- 3. The third ground is, that the levy is excessive. There are no facts set out, and no reason given why the levy is excessive. The fi. fa. being for about \$1,000.00, besides the accumulating interest, and the quantity of land not appearing to be more than sufficient to bring the amount, we see nothing illegal in the levy on this ground.
- 4. The fourth ground is, that the land levied upon is not the land of the defendant. If that be so, it is a matter about which he need give himself no concern, but al-

Woods vs. Pearce.

low the real owner to protect, in the proper way, his own property from an improper sale.

- 5. The fifth ground is, that the levy does not properly describe the land. The land is described by the number of acres, the numbers of the lots, the number of the district, and the name of the county in which it formerly was, as well as that in which it now is. If there be any misdescription in any way, it should have been set out; none appearing, the levy is correct.
- 6. The defendant in error insists that the writ of error in this case was sued out for delay only, and that damages should be given to the plaintiff below. This seems so manifest to us, that we cannot refuse to recognize the right of the plaintiff in fi. fa. to have the same awarded, and the judgment is therefore affirmed, with ten per cent. damages to be entered in the remitter, and recovered of the said plaintiff in error.

Judgment affirmed, with ten per cent. damages.

# WOODS vs. PEARCE.

- In 1855 a slave could not acquire title in Georgia by descent or otherwise, nor could a valid trust be created in his favor.
- 2. The act of 1819, which provided that free persons of color could acquire and hold real estate in Georgia, except in certain cities, and that the same should remain in the owner or his or her descendants after death, contemplated that such descendants would be free persons of color. Therefore, where a free person of color died in 1855, leaving an estate and no heir save a slave, the title did not vest in him; nor did it subsequently vest upon his emancipation.

Title. Slaves. Estates. Equity. Inheritance. Before Judge WILLIS. Muscogee Superior Court. November Adjourned Term, 1881.

Reported in the decision.

CARY J. THORNTON; G. E. THOMAS, for plaintiff in error.

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Woods vs. Pearce.

PEABODY & BRANNON, for defendant.

SPEER, Justice.

John Woods, the plaintiff in error, filed his bill against defendant, alleging that in 1840, his mother, Celia Woods, a person of color, was set free and emancipated in Florida, and soon thereafter removed to Columbus, in Muscogee county, of this state, and by her energy and industry accumulated a considerable estate; while she lived there and carried on her business, one Lee was her guardian or trustee, and as such held the title and possession of her In the year 1852, she purchased of one Robinson the northeast corner of lot number 54, in the Coweta reserve, and lot 55, all situated in the Coweta reserve, at the Coweta Falls, on Chattahoochee river, in Muscogee county, at the price of \$1,000.00. At the time of the purchase she paid through her guardian eight hundred dollars to Robinson, and Robinson made a deed in fee simple to said Lee as guardian of said Celia. She afterwards paid Robinson the balance of purchase money. That said Celia went into possession of the land and so remained till her death, which occurred in 1855. Said deed was never recorded, and the same is lost or destroyed. After the death of Celia, Lee controlled the property, and in the year 1856 sold it to Tillman J. Pearce, the defendant, for the sum of one thousand dollars, and made him a deed in his own name. That Pearce had full knowledge that Celia owned said land and died in possession, and that Lee held it as guardian of Celia. That afterwards Pearce sold the land to innocent purchasers for value, who had no knowledge of the fraud between Lee and Pearce. Afterwards complainant brought his suit in ejectment to recover said land against the parties in possession, and failed, because they were innocent purchasers, and without notice.

Complainant avers that his mother, Celia, was a slave before her emancipation in Florida, in 1840, and complain-

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ant was a slave until his emancipation by the results of the late war. He avers Lee has died, and his estate was insolvent and has been fully administered. Avers Lee never sold the property as guardian at the death of said Celia for a division among her heirs, and the same has never escheated to the state. Charges that Pearce well knew how Lee held said land; that he had no title only as guardian, but he combined and confederated with Lee to defraud the heirs and representatives of said Celia, and for this purpose he gave Lee one thousand dollars for his title, and he placed and transferred the same into the hands of innocent purchasers for value. He avers the property in the hands of Pearce was worth \$1,500 00 and is now worth \$5,000.00.

Complainant avers he is the child and sole heir at law of said Celia, and that he had no knowledge of the title of his mother until 1878, and no knowledge of the fraud until the year 1879, on the trial of the ejectment cause, when Pearce then promulgated it as a witness from the stand. The prayer is for Pearce to be decreed to pay complainant the value of the property with interest, and for general relief.

To this bill counsel for defendant demurred, and moved to dismiss the same, which motion the court sustained, and plaintiff in error excepted.

Taking the facts stated in the bill as true (as a demurrer is made thereto) has complainant any cause of action set forth, or right to recover under the allegations and charges of his bill?

It appears that his mother, Celia, was emancipated in 1840. By the act of 22d December, 1819 free persons of color were allowed to hold and acquire real estate in Georgia, except in the cities of Savannah, Augusta and Darien, and the statute declares "the same shall remain in the owner or in his or her descendants after his or her death." Cobb's Digest, 995. But while it is true, that under the act of 1819 real as well as personal property, thus ac-

#### Woods us. Pearce.

quired by free persons of color, on their death intestate descended to their descendants or heirs at law, it was certainly contemplated that those descendants who were to take should likewise be free persons of color. But complainant was born before his mother was free, and was a slave at his birth, and so continued until emancipation. Under the laws in force at the death of Celia Woods, in 1855, in this state, no slave could acquire or hold title to property. They were chattels and could acquire no property, either by descent or purchase, and were incapable of holding such title. Their acquisitions even belonged to their owner. 25 Ga., 430; 64 Ib., 32.

And although this bill is filed after the complainant has been emancipated, yet at the death of his mother, when the title would have descended to him, if at all, he was a slave and incapable of inheriting or acquiring an estate of any kind. 46 Ga., 399.

Neither could any valid trust be created either by contract or by operation of law for the benefit of a slave then being, and to continue to live in the state, within the limits of the state. 58 Ga., 118. The rights of the complainant must be construed under the law as it existed at the death of Celia Woods in 1855, and at that time no title descended to him by reason of his incapacity to acquire or inherit it, and while it would seem just and natural that this property, the fruits of the industry and labor of the deceased mother, according to the statements in the bill, should have descended to and been enjoyed by her descendant, "yet, the mandatory requirements of the statutes in force in 1855, which must control this question, leave us no discretion."

Let the judgment of the court below be affirmed.

Murdock vs. Hunt.

## MURDOCK vs. HUNT.

- 1. The grant of letters of administration in a contest between relatives of a decedent, should be to the next of kin, according to the law of relationship and distribution. The law of relationship should not be relied on to the exclusion of that of distribution.
- (a.) Therefore, where neither of the applicants are distributees, the court should not charge as a matter of law that the nearest of kin by the law of relationship is entitled to letters, although the ordinary, or, on appeal, the jury, might take that into consideration, with other qualifications, in deciding the contest.
- 2. Where a person clearly entitled to administer upon an estate, and with no other person equally near of kin, selected one of two contestants to administer on the estate, and the jury found in favor of that contestant, the verdict will be upheld, even though the charge of the court was not strictly correct.
- 3. Should such a selection be in writing? Quare.

Administrators and Executors. Estates. Before Judge ERWIN. White Superior Court. May Term, 1881.

Reported in the decision.

A. F. UNDERWOOD & SON; J. J. KIMSEY, for plaintiff in error.

C. H. SUTTON; W. T. CRANE; W. H. WILLIAMS, for defendant.

JACKSON, Justice.

This was a contest for letters of administration, on appeal to the superior court of White county from the ordinary. The jury, under the facts and charge of the court, found that the defendant in error and caveator was entitled thereto, over the plaintiff in error, who was the applicant for the letters, and the refusal of the court to grant to the latter a new trial, is the error assigned here:

1. The applicant is the great-grandson of the intestate, the caveator the grandson; and at the time of the death

### Murdock vs. Hunt.

of the intestate, neither was entitled to any share of his estate—their parents, or grandparents, being then in life, and distributees thereof. The great-grandson was interested in the estate at the time of the application—his parents and grandparents being dead; the grandson was not, his mother, an heir at law and distributee, being alive, and being the only living distributee of the estate of the intestate. Under this state of facts, the court charged the jury to the effect that the grandson was entitled as next of kin, being nearer to the intestate than the greatgrandson, and neither being distributees of his estate at the time of his death. The Code declares the next of kin, according to relationship and distribution at the time of the death, entitled. Code §\$2404-2. Thus the statute contemplates not only relatives, but relatives entitled to distribution; and neither of these is, or was ever, a distributee of this estate. The grandson is a distributee of no estate, for his mother is living, and nemo est haeres viventis; the great grandson is not a distributee of this estate, but of that of his ancestor upon whom the inheritance fell at the death of the intestate. Under the law of relationship and distribution, therefore, neither the applicant nor the caveator was entitled, for neither is, or was at the death, a distributee of this estate. We cannot say, therefore, that the court was right in charging the jury, that as matter of law the grandson was entitled, as next of kin. such a contest, on such facts, perhaps the grant to the one or the other rested in the discretion of the ordinary, and on the appeal in that of the jury, under the instructions of the court as to nearness of blood, qualifications, interest at the time of the application for or against the estate, etc. For neither being a distributee, it would seem that neither on account of mere nearness of blood, both under our Code and the law before the Code, would be absolutely entitled to letters. See 25 Ga., 624; 29 Ib., 519; 31 Ib., 624; Williams on Executors v. I, pp. 485, 491, 492.

### Murdock vs. Hunt.

2, 3. Who then is entitled? Under the facts this record discloses, the mother of the caveator is clearly entitled, for she is the only living person at the date of the application who was next of kin according to the law of relationship and distribution when the intestate died. And being so entitled, the record shows that she designated her son, the caveator, to take the administration. Therefore, whether the charge be right or wrong, no harm was done by it; because the fact that the only person entitled clearly to letters designated the person to whom the jury by their verdict granted them.

A point was made by the counsel for plaintiff in error, who argued his cause with much learning and zeal, that this designation should have been in writing under section 2494, sub-section 4 of the Code; but that sub section applies to cases where there are several who are next of kin. In such cases there are obviously good reasons why the choice of one of them should be in writing, to avoid all dispute among many equally entitled and standing in the same degree; but here but one was so entitled, and she chose her son to act. It seems to us to come rather under the spirit of sub-sections 6, 7 and 10, of §2494; and a designation in writing not to be essential. 63 Ga., 458.

But be that as it may, the testimony before the jury that she did designate the caveator was not objected to; it went before them as evidence and makes the verdict stand as required by the evidence.

Besides, should the case be remanded for a new trial, she would then designate her son to act, and if necessary make the selection known in writing.

Therefore, while we doubt that the charge of the court is precisely the law, in that it seems to ignore the law of distribution in this case, because neither contestant was a distributee, yet as the grandson is more nearly related to the intestate than the great-grandson, we will not send the case back on this doubt; but affirm the judgment denying the new trial mainly on the ground that the person

Venable vs. Howard, ordinary, for use.

entitled to administration selected the defendant in error, and thus made him entitled to stand in her shoes and administer her father's unadministered estate.

We do not think that his being a creditor, even if he is, should defeat the grant. Under our law, when there are no next of kin, it may entitle him (sub-section 5 of section 2494); and if neither be next of kin, the applicant nor himself under the law of distribution, the fact that he is a creditor would add to his claim. On the whole the verdict ought to stand.

Judgment affirmed.

# VENABLE vs. HOWARD, ordinary, for use.

- There was evidence in this case on which to found the charge as given by the court.
- 2. After January 1, 1863, a guardian had no right to invest the Confederate money of his ward in his hands, except for state securities, without an order of the superior court. If he did so, he became liable for the value of such money at the time it was so invested.

Charge of Court. Guardian and Ward. Confederate Money. Before Judge ERWIN. Jackson Superior Court. February Term, 1881.

Reported in the decision.

W. L. MARLER; J. B. ESTES & SON, for plaintiff in error.

W. I. PIKE, for defendant.

SPEER, Justice.

The defendant in error brought his action on a guardian's bond, given by John Venable, as principal, and William M. Duke and H. C. Appleby, as securities, to

Venable vs. Howard, ordinary, for use.

recover an amount claimed to be due by the guardian to his ward, Terrell Wood. On a former trial, a verdict was returned for the defendants, but on a motion for new trial and to set aside the verdict, the court granted a new trial, as against Venable, the principal in the bond, but refused it as to the securities, holding that they had been discharged by the act of Terrell Wood, the usee. The present trial, therefore, presented an issue between the usee of the bond, and the principal, Venable, alone. On the trial a verdict was, under the evidence and charge of the court, returned in favor of the plaintiff, a motion for a new trial was made on the grounds as set forth in the record, which was refused by the court, and defendant excepted.

The grounds of the motion for a new trial, were:

- (1.) Because the verdict is contrary to the evidence and to the weight of evidence.
  - (2.) Because the verdict is contrary to law.
- (3.) Because the court erred in charging the jury, "that the defendant had no legal right to loan out the Confederate money, or invest the same after the first day of January, 1863 (except for state securities), without an order from the superior court, and if the defendant, without an order from the judge of the superior court, invested the Confederate money in the currency known as seven-thirties, then the defendant is liable for the value of such Confederate money at the time he so invested it."

Counsel for plaintiff in error, in his argument before this court, relied mainly for a reversal upon the last ground in the motion, alleging as error that there was no sufficient evidence before the jury of an investment by plaintiff in error, upon which to rest this charge, but that the plaintiff in error merely exchanged one species of Confederate currency for another, which, though known as seventhirties, was in the similitude of Confederate currency, and passed as such, and that said currency having perished on his hands, plaintiff in error was not liable to respond for the value thereof. Whatever may have been the testi-

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mony of the plaintiff in error on this point (and he was the only witness), when he answered the interrogatories propounded to him, it is equally true that when he made his returns to the ordinary, touching this fund, he did return it as "invested" in the Confederate seven-thirties, and this return was verified by his oath; and his version of it when thus made, and when the matter was fresh in his mind, the jury could believe in preference to his present recollection. We think there was sufficient evidence for this charge, under the facts before the jury, and the rule of law, as given in charge, is one that has been repeatedly recognized by this court. See Code, §§1833, 2330; 54 Ga., 291; 52 Ib., 600; 48 Ib., 471.

Let the judgment of the court below be affirmed.

## ISAACS vs. DAVIES.

If a servant be employed for five months at a specified rate per month, payable monthly, and pending the employment he be wrongfully discharged, he may, in his option, sue at the end of each month, and a recovery for one month will be no bar to a suit at the end of the next month.

Master and Servant Actions. Former Recovery. Before Judge PATE. Pulaski Superior Court. November Adjourned Term, 1880.

Reported in the decision.

L. C. 'RYAN, by brief, for plaintiff in error.

KIBBEE & MARTIN, for defendant.

CRAWFORD, Justice.

It appears by the record in this case that Isaacs, the plaintiff in error, employed Davies, the defendant in error, to clerk for him for five months, at \$35.00 a month, pay-

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able at the end of each month. That soon after Davies commenced work he was detained three or four days therefrom by the sickness and death of a child, Isaacs, however, consenting to his absence. Upon his return, Isaacs refused to allow him to continue in his service, or further to perform his contract, but discharged him.

At the end of the first month Davies sued him and recovered judgment for \$35.00, which was paid. At the expiration of the second month Davies brought suit for that month's wages. Isaacs pleaded the general issue and the former judgment in bar of this suit; the court gave judgment, under the proofs, for the plaintiff, Davies, for \$35.00, as the amount due on the second installment for his wages. *Certiorari* was granted Isaacs, and upon the hearing thereof it was dismissed, and he excepted.

The record shows that there was no disagreement between the parties as to the terms of the contract, though there was as to the cause of the discharge. The contract was for five months, at \$35.00 a month, payable monthly. This being so, the first judgment was no bar to the second suit, and settled nothing, except that the first month's wages were due and unpaid. Had Isaacs continued Davies in his service and failed or refused to pay him at the end of each month, no one would question his liability to suit and judgment. If, then, he discharged him wrongfully, he did not, and could not thereby discharge himself from liability. If Davies kept his part of the contract, or offered to keep it, and was not permitted to do so by the acts of Isaacs, the latter cannot set up his own breach of the contract to discharge himself from its performance. See Code, \$2939; 53 Ga., 82; 1st Story on Con. §\$25 (d.) 29.

Judgment affirmed.

### Venable, guardian, vs. Cody.

# VENABLE, guardian, vs. CODY.

- A trustee may discharge himself from liability by showing that he received Confederate money at a time when it was the common and only currency, and when prudent business men were receiving it, and that it became worthless in his hands; but the facts and circumstances under which it was received must be clearly and satisfactorily shown as evidence of good faith, and the burden is on the trustee.
- (a.) In the present case the trustee failed to sustain the onus thus cast on him.

Guardian and Ward. Trusts. Confederate Money. Before Judge ERWIN. Jackson Superior Court. February Term, 1881.

Reported in the decision.

W. L. MARLER; J. B. ESTES & SON, for plaintiff in error.

W I. PIKE, for defendant.

# CRAWFORD, Justice.

This case arose on a statutory proceeding instituted by Cornelia Cody against John Venable, her guardian, citing him to appear before the ordinary of the county, and submit to a settlement of his accounts. The case was carried by appeal to the superior court, and upon the trial had the plaintiff recovered the sum of \$482.97, besides interest. The defendant moved for a new trial, because the verdict was contrary to law and contrary to evidence, which motion was refused, and he excepted.

The guardian was appointed, and received for his ward \$495.30 in February, 1859. His defence to the suit was that the estate drifted into Confederate money, and was lost by the results of the late war between the states. And in further defence he pleaded a final settlement and receipt in full.

### Venable, guardian, vs. Cody.

The evidence shows that in payment of his ward's estate he received his own note from the administrator of her father's estate. He paid out from 1860 to 1863 inclusive, some small sums for which he had vouchers approved by the ordinary. It further appears that in September, 1875, he went to the house of Cornelia Cody's step-father, reaching there after dark, and just before or after midnight, paid her fifty dollars in settlement of his liability as her guardian, and took her receipt in full. He told her that her estate had all gone into Confederate money and insolvent notes. No further explanation was given or showing made, and no exhibition of his management of her affairs.

When it is remembered that the payment to him by the administrator of his ward's father was in his own note: that no proof was offered to show that he ever had in his possession one dollar of either Confederate or any other kind of money set apart to his ward; that he made no statement to her of the manner in which her money had been used; offered her neither Confederate money nor the insolvent notes which of right were hers; that he went after dark to her father's, and about II o'clock by one witness, and after midnight by another, this receipt was obtained, we are not surprised at the finding of the jury. The more especially is this so, when we further remember that even upon the trial of the case no testimony was produced to show that he had acted in good faith to preserve this estate, nor how, nor in what manner, he had failed to do so.

Trustees have heretofore, and can now discharge themselves from liability by showing that they received Confederate money when it was the common and only cur rency, and when prudent business men were receiving it but the facts and circumstances under which it was received, must be clearly and satisfactorily shown as evidence of their good faith and the fairness of the transaction. 48 Ga., 471. The burden of proof is on them and

#### Butler er. Davis.

to discharge themselves they must produce it. Not having been done in this case, the judge committed no error in refusing a new trial.

Judgment affirmed.

## BUTLER VS. DAVIS.

In 1873 a constable could not levy a tax f. fa. for more than fifty dollars. In a claim case arising out of a sale under such a levy, the execution and sheriff's deed were properly rejected from evidence

Levy and Sale. Executions. Constables. Before Judge FLEMING. Early Superior Court. April Term, 1881.

Reported in the decision.

E. C. Bower, by brief, for plaintiff in error.

R. H. POWELL; KENNON & HOOD, for defendant.

JACKSON, Chief Justice.

On the trial of this claim, the claimant tendered in evidence a deed made by the sheriff to the land in controversy which was levied on by a constable for taxes of defendant in execution in the year 1873, the tax execution amounting to more than fifty dollars; to the introduction of the tax execution and the deed the plaintiff in execution objected on the ground that the constable had no legal power to make the levy, and the court sustained the objection, quashed the f. fa., and there being no evidence for claimant, a verdict was had condemning the property, the proof being possession by defendant in f. fa. since the judgment.

We do not see why the court quashed the tax fi. fa. It was enough for the adjudication of the case at bar that the fi. fa. and deed be ruled out as not showing title in

### Butler vs. Davis.

claimant. The tax collector for the state and county should be heard thereon before it is quashed, it strikes us; but it is wholly immaterial to the claimant what became of it, whether quashed or not, if his title through a sale under it was not good. Was the deed and fi. fa., with entries, properly ruled out? That is the question he is interested in, and which he properly makes on this writ of The fi. fa. was not properly directed. It should have been directed to all and singular the constables of this state; Code, §886; and the language of the Code is that it must be so directed. Perhaps, however, "to any lawful officer" is a substantial compliance, and under section 4, sub-section 6 of the Code, the fi. fa. may be upheld, as the section 886 does not declare it void unless so dir-But nothing has been said here on that point. The ruling of the court below is that the constable could not levy a tax fi. fa. over fifty dollars, and therefore the deed and fi. fa. were ruled out as testimony for the claimant.

The general rule is that levies shall be made by constables of executions within the jurisdiction of justices of the peace, and sheriffs of those beyond it, and in the light of that general law we think that constables could not levy a tax fi. fa. for more than fifty dollars. These executions are directed to all and singular the sheriffs and constables, in order that the proper officer might levy; but as the penalty on a party suing in the superior court for a sum within the justice court jurisdiction was merely a loss of costs beyond justice court cost, and the sheriff would execute the mandate of the superior court even for such a sum, it was deemed necessary to restrict the sheriff's powers to levy in tax cases. Therefore the section 888 of the Code, and the decision in 60 Ga., 466.

Section 888 of the Code, construed in the light of the general law, means that sheriffs shall levy, if the tax execution be for more than fifty dollars, and constables if for that sum or less, in the year 1873.

The act of 1876 was passed after this levy, and cannot

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affect the case. Besides, the execution is only signed D. M. Roberts, T. C., and it does not specify whether it was for state or county tax, or for both. Nor is there evidence that Roberts was tax collector, so as to explain the meaning of T. C.

Taking the whole state of this execution, we think it very loosely drawn. A lot of land of 250 acres was sold and bought by claimant under it for five dollars, and the verdict subjecting it cannot be very wrong. We put the ruling, however, on the point that the constable could not make the levy, and that this warranted the court in ruling out the deed made by virtue of that levy and sale.

When that deed was ruled out, the plaintiff had a right to the verdict, because the defendant had been in possession since the rendition of the judgment.

Judgment affirmed.

## JONES vs. CRAWLEY et al.

- I. A will contained the following item: "I give and bequeath the whole of my estate, both real and personal, not disposed of above, to my three sons, (naming them) and my daughters (naming them) to be equally divided among them, i.e., the proceeds of all my property, none of which is to be sold except what personal property may be on hand at my death, and which cannot be equally distributed; and should any of my children die, leaving no heirs, I desire that their pro rata share be equally divided amongst my living children and the grandchildren of any of my children that may be dead; and I desire that all of my real estate shall descend to my grandchildren after the death of my own children, and that no part of my estate shall ever be subject to pay the debts of any of my daughters husbands:"
- Held, that such item created a life estate in the children with remainder to the grandchildren of the testator.
- 2. Where a levy has been made on realty as belonging to a defendant in f. fa. who is in fact a life tenant, though, on proper case made, injunction may issue to restrain the sale of the remainder, yet the sale will not be therefore wholly enjoined, but the life estate may be sold.

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3. Where persons other than the defendant in f. fa. seek to enjoin a sheriff's sale, on the ground that they have tendered a claim affidavit and bond which the sheriff refused to receive, it should appear that such claim papers were in proper form and the security sufficient, and that the sheriff refused to receive them without good cause.

Wills. Estates. Injunction. Equity. Before Judge STEWART. Pike County. At Chambers. May 14th, 1881.

To the report contained in the decision, it is only necessary to add the following:

A fi. fa. in favor of Jones was levied on certain land. Crawley, on behalf of himself and his children, filed a bill to enjoin the sale. He claimed as a life tenant under the item of his father's will set out in the first head-note above, and for his children as remaindermen. He alleged the tender of a claim affidavit and bond to the sheriff on behalf of his children, and his refusal to receive them. The court granted an injunction, and Jones excepted.

J. H. WALKER, for plaintiff in error.

W. S. WHITAKER, for defendants.

JACKSON, Chief Justice.

The chancellor granted an injunction to restrain the judgment creditor from proceeding against the property of defendant in execution at the prayer of the said defendant, in his own right and as next friend of his children. The allegation is that he has a life estate only and the children the remainder under the will of his father, which is exhibited to the bill. The fifth item of the will which disposes of the land in question is as follows: "I give and bequeath the whole of my estate, both real and personal, not disposed of above, to my three sons (naming them) and to my daughters (naming them) to be equally divided among them, i. e., the proceeds of all my property,

### Jones vs. Crawley et al.

none of which is to be sold, except what personal property may be on hand at my death, and which cannot be equally distributed; and should any of my children die, leaving no heirs, I desire that their pro rata share be equally divided amongst my living children and the grandchildren of any of my children that may be dead; and I desire that all of my real estate shall descend to my grandchildren after the death of my own children, and that no part of my estate shall ever be subject to pay the debts of any of my daughters' husbands they now have or may hereafter have."

The bill alleged that the complainant had under this clause a life estate and his children a remainder, and that he had interposed a claim to that effect, but the sheriff had refused to receive the claim affidavit and bond, and therefore he prayed for the interposition of equity by injunction.

We think that the complainant took under the clause of the will above stated a life interest and his children the remainder; but admitting this to be so, the injunction should not have restrained the sale of the life estate. 59 Ga., 414.

The chancellor says that this point was not made before him, and that he did not rule that the life estate should not be sold. But the prayer of the bill is to enjoin any sale, and of course this included the life estate; and the injunction restrains the sale of all as prayed for.

Moreover it is not alleged that the surety tendered in the claim case was solvent, and it may be that the sheriff properly rejected the claim papers for that reason.

To enjoin a judgment from proceeding, a clear case should be made that equity has jurisdiction, and it has none if the remedy at law be complete. It was complete if a proper claim with good security had been offered to the sheriff, and it must appear from the bill that such a one was offered, and that the sheriff without any good reason refused to accept the claim papers, before equity

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will interpose. The presumption is that the officer did his duty, and it requires a distinct allegation to the contrary to rebut that presumption.

The court therefore erred in granting the injunction as prayed for, and the case is remanded that action be taken below, so as to conform to this opinion.

Judgment reversed.

## GIRTMAN vs. STANFORD.

- 1. Where the affidavit to obtain a distress warrant alleged that certain rent was due, and a counter-affidavit was filed which stated that the sum distrained for was not due, it was in accordance with the statute, and was not demurrable.
- When a counter-affidavit to a distress warrant has been dismissed on motion of plaintiff, the case passes out of the jurisdiction of the court, and a judgment for the rent claimed cannot be rendered.

Distress Warrant. Landlord and Tenant. Practice in Superior Court. Judgments. Before Judge Hood. Decatur Superior Court. May Term, 1881.

Reported in the decision.

TERRELL, GURLEY & MORRISON, by JACKSON & LUMP-KIN, for plaintiff in error.

No appearance for defendant.

SPEER, Justice.

A distress warrant was issued in favor of defendant in error against plaintiff in error for four bales of low middling cotton, alleged to be worth one hundred and eighty dollars. To this warrant plaintiff in error filed a counteraffidavit. On the trial, defendant in error demurred to the counter-affidavit, which demurrer the court sustained, and dismissed the affidavit.

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Defendant in error then moved to enter up judgment against plaintiff in error without evidence, or without submitting the same to a jury, to which plaintiff in error objected. The objection was overruled, and the court allowed judgment to be entered against the plaintiff in error, and his security on his bond for the amount of his alleged debt, with interest and cost. To these judgments of the court plaintiff in error excepted and assigns the same as error.

1. The counter-affidavit, made by the plaintiff in error to the distress warrant, sworn to by him, alleged "that the sum distrained for under a warrant issued in favor of U. S. Stanford against deponent, for one hundred and eighty dollars, alleged to be due said U. S. Stanford by deponent, is not due."

The Code, §4083, declares: "The party distrained may in all cases replevy the property so distrained, by making oath that the sum, or some part thereof, distrained for is not due," and give security for the actual condemnation money, etc.

Under this section, the defendant may arrest the warrant, either by swearing that the sum distrained for is not due, or that some part thereof is not due; and, in examining the record, we are of opinion that the counter-affidavit was in full, if not in literal, compliance with the statute. He swore "the sum distrained for was not due;" and that is what the statute required him to do. We are of opinion the court erred in sustaining the demurrer and dismissing the affidavit.

2. As to the other assigned error, that after said affidavit was dismissed the court allowed the defendant in error to enter a judgment, without evidence and without a jury, against the plaintiff and his security on the replevy bond, this court has ruled, "the counter-affidavit to a distress warrant for rent brings the case into court, and when said affidavit is dismissed on motion of the plaintiff, the case passes out of the jurisdiction of the court, and is remanded

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to the sheriff, by operation of law, there being no longer any case in court." 61 Ga., 199; 63 Ib., 519.

Let the judgment of the court below be reversed on both of the grounds taken in the assignments of error. Judgment reversed.

# THE WESTERN AND ATLANTIC RAILROAD COMPANY vs. Greeson.

[JACKSON, Chief Justice, being disqualified, did not preside in this case.]

Where a party has to resort to a *certiorari* in order to correct the errors of an inferior judicatory, the consent of the other party before the superior court to make the correction, will not authorize the dismissal of the *certiorari* and a judgment for costs against the applicant therefor.

Certiorari. Verdict. Judgments. Costs. Practice in Superior Court. Before Judge UNDERWOOD. Gordon Superior Court. February Term, 1881.

Reported in the decision.

T. C. MILNER; W. D. ELLIS, for plaintiff in error.

E. J. KIKER, for defendant.

CRAWFORD, Justice.

This was a suit originating in a justice's court, brought by Greeson to recover the value of a cow killed by a train of the Western and Atlantic Railroad Company. The magistrate first tried the case, and gave a judgment against the company for \$31.60. The company then appealed to a jury, and on the trial, under the proofs, the jury found a verdict for the sum of \$33.00. The company then petitioned the judge of the superior court for certiorari, which was granted, and upon the hearing of the case, the

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judge dismissed the *certiorari*, and allowed a judgment to be entered up for \$30.00 against the company, and from this judgment a writ of error was sued out and the case brought to this court.

The errors complained of in the *certiorari* are, that the jury upon the trial in the justice's court gave a verdict for \$33.00, when the highest proved value of the cow was only \$30.00; and that the *preponderance* of evidence was, that there was no negligence, or want of care, on the part of the company in killing the cow.

The judge of the superior court, upon the petition and answer, after allowing the sum of \$3.00 to be written off, dismissed the *certiorari*, ordered the judgment of the court below to be sustained for \$30.00, and that the plaintiff in *certiorari* pay the costs.

The only question insisted upon before this court was the error of the judge, in allowing the defendant in *certio*rari to write off a part of his verdict, of which complaint was made in the *certiorari*, and then dismiss the same at plaintiff's costs.

Where a *certiorari* has to be resorted to in order to correct any error committed in an inferior judicatory, the consent before the superior court to make the correction, will not authorize the dismissal of the *certiorari* and a judgment for costs against the plaintiff. 56 Ga., 546; 46. Ib., 454.

Had the record shown that the plaintiff below, when the verdict of the jury was received, had proposed to write off this excess above the proof, that, in our judgment, would have authorized the ruling of the judge in the case when before him on the *certiorari*. But when the defendant was compelled to resort to his quasi writ of error to correct the error below, he is not, under the law, liable to be taxed with the costs.

Judgment reversed.

## OBEAR, executor, et al., vs. GRAY.

- I. Where a usee for whom a trust had been created filed a bill to have the property turned over to him, and the turning point of the case was whether the complainant was sui juris, if counsel agreed to submit that question alone to the jury, stripped from questions of waste or like questions, a decision thereon was final, and could be brought to this court.
- Where the chancellor in an equity cause substantially submitted the issues necessary to be passed upon, if counsel desired a fuller submission or a submission in a different form, they should have requested it.
- Where on the direct examination a witness states a fact which, on cross-examination, it appears that he stated on hearsay, the testimony will be excluded on motion.
- 4. For a bailiff in charge of a jury to tell them while considering the case and apparently finding it difficult to agree, that in his opinion the judge would keep them out a week or compel them to agree, was such practice as necessitates a new trial.
- 5. The jury being detained over Sunday in the consideration of a case it was error to allow them to go to a park, which was a place of public resort, and to separate from each other for some time; and a new trial will result unless it be clearly shown that nothing occurred with them or in their presence or hearing which could affect the case.
- (a.) In this case the purgation is not complete.
- If it appear that a verdict was the result of lot or chance, it will be set aside.
- (a.) While a juror may not impeach his finding either by direct testimony, or by admissions, yet the general conduct of the jurors and the circumstances attending the finding in this case, indicated that it was not arrived at in a legal way.

Practice in Supreme Court. Practice in Superior Court. Evidence. Jurors. Verdict. Before Judge SIMMONS. Bibb Superior Court. April Term, 1881.

To the report contained in the decision, it is only necessary to add, in connection with the third division thereof, that the question being whether Gray was capable of managing property or not, Hickman testified to his conduct-

ing business and making money; but on cross-examination it appeared that he received his information from statements of Gray himself, and thereupon the testimony was excluded.

Lanier & Anderson; Hall & Son, for plaintiffs in error.

J. RUTHERFORD; WHITTLE & WHITTLE; J. C. RUTHERFORD, for defendant.

CRAWFORD, Justice.

William Gray by his last will and testament gave George S. Obear one-fourth of all his personal and real estate in trust for his son, Edwin T. Gray, whom he believed to be wholly incompetent to take care of it. This property was to be managed and controlled by the trustee for the benefit of the cestui que trust, whose expenses were to be limited to the income from the property, and who was not permitted to bind his estate by any contract not assented to in writing by the trustee. The will was duly probated, and is of full force and effect in all its parts as a will.

The cestui que trust filed a bill against Obear, the executor and trustee, calling upon him to account for and pay over to him the trust funds so set apart for his benefit by his father's will. Upon the trial of the case, the court below held that he was not entitled to recover the property, because it was an executory trust which the father had the legal right to create, that he might protect the property bequeathed to his son. Upon a review of that case by this court, it was held to be an executed trust, and that such an estate could not be created in property for the benefit of a male who was sui juris.

This decision of the supreme court was met by answer of the defendant in the court below, that the complainant was non compos mentis at the time of the execution of the will, and still remained in that condition.

Upon the second trial, the jury found for the defendant, but for errors committed on the trial, the verdict was set aside, and a new trial ordered. When the case came on for trial the last time, it was agreed by the parties that the question of whether the complainant was sui juris or not should be stripped of the question of waste and mismanagement, which was also charged against the trustee, and that that issue be tried by itself. It was so tried, and the verdict was that the cestui que trust was not sui juris when the will was executed, but that he was not then, at the time of the trial, so unsound or weak in mind, or so imbecile, as that he could not manage property in the ordinary affairs of life.

The defendant moved to set this verdict aside, because of errors committed on the trial, which motion was refused by the court, and that refusal brings the case up again.

1. The first question made before this court was a motion to dismiss, because the case had been prematurely brought.

It was insisted that the verdict and judgment in no view could have been a final termination of the suit. Enough has been stated to make clear the nature of this point. The case had been brought by the complainant in his own right, as one having a legal standing before the court. The defendant put in issue that very question, and had it been decided in his favor, there would have been no legal party complainant before the court. As to him, as a party sui juris, certainly the case would have been at an end; but as to the court's retaining it, that some one else might be authorized to represent the party who was not himself sui juris, is a matter not considered by the court below, and is therefore not before us. We deal with the case as it is made here. The motion to dismiss is therefore overruled.

2. There were several grounds set forth in the motion for a new trial which we now proceed to consider.

One of the errors alleged to have been committed by

the court was in submitting the second issue to the jury, which was. "Whether Edwin T. Grav is now so unsound. or so weak in his mind, or so imbecile, that he cannot manage his property as ordinary men manage property in the ordinary affairs of life," instead of, "Has Edwin T. Gray, since the execution of his father's will, become so sound of mind as to be now capable of managing property as ordinary men manage their property?" Whilst we think the latter would have been a more appropriate form in which to have put the issue, still, as it was not presented to the judge in that way and refused by him, it was no error that he did not so submit it. This court has held. where issues are to be passed upon, that counsel, if not satisfied with such as are proposed, or if they desire that there should be others, have the right to suggest them, and have them submitted to the jury or refused; if, however, this be not done, then it is too late for them to complain.

Our judgment is, that in view of this effort on the part of the father to secure this property to the use and enjoyment of his son through life, that before it is taken out of the hands of the trustee and placed in the control of the cestui que trust, against whose management the father was endeavoring to guard it, the reasons prompting him should be well ascertained to have passed away.

This trust should not be destroyed, and the will quoad hoe set aside, upon any uncertain or doubtful grounds; hence, the issue should be well defined as to his soundness of mind and capacity to manage his property, not temporarily but permanently.

- 3. The objection to the testimony of Sidney Hickman as set out in the fourth ground of the motion for a new trial, should have been ruled out after it was known that his information was obtained from the complainant.
- 4. But the main errors upon which we think that the case should be sent back, are those arising from the conduct of the bailiff and the jurors, whilst they had the case

under consideration. It appears from the record that the bailiff, who under the law, had the jury in charge, after they had been out for some time considering what verdict they should render, being very restive and impatient, and while they were standing about five to seven, as appears from the affidavits, told them that in his opinion the judge would keep them out a week or compel them to agree.

According to the recorded judgment of this court in the case of *Gholston vs. Gholston*, which was a libel for divorce, and reported in 31 *Ga.*, 625, it was held that a jury was improperly influenced by the sheriff's telling them that unless they speedily agreed upon a verdict, the judge would carry them to Elbert county, and that he was making preparations for that purpose.

The deliberations of a jury are not to be interfered with whilst they are considering the law and the testimony which alone must control their verdict. They are by no means to be influenced by the fear of a week's confinement, to alarm them into an agreement. Such a suggestion, even by the very officer in whose custody they are placed, would be highly improper, and especially so in view of the fact that they are thus placed to prevent every outside influence by word, sign, or speech, from affecting unlawfully their finding.

5. But other and quite as serious complaints are made in reference to allowing the jury to be carried to the public park, a place of great resort, especially on Sundays, and allowing them whilst there to pass about, and to separate for some considerable time. Every jury is to be carried to the jury room, or some other private and convenient place, where they are not to be spoken to by the officer having them in charge or others, unless by leave of the court. To take them, therefore, to a park, which is said to be a place of great public resort, especially on the Sabbath day, where they are almost sure to hear something said about the case, whether they would or not, is most clearly a violation of the spirit and purpose of the

law in withdrawing them from the body of their fellowcitizens until they have agreed upon their verdict. We think that this was a good ground upon which to set aside the verdict, unless it was clearly shown that no such thing occurred while they were in the presence and hearing of other visitors. It is true that the affidavits offered show every thing necessary to purge them, except that it does not appear but that they heard bystanders make remarks about the case. To make the purgation complete, this should affirmatively appear. 37 Ga., 332; 38 Ib., 216; 56 Ib., 653.

6. Lastly, it is insisted that the verdict was the result of lot or chance. This ordinarily cannot be positively shown; it can only be reached by such facts as may be gathered in a legal way from what others than the jurors could testify to. The bailiff in charge of the jury swears that on Saturday night whilst there was considerable disorder in the jury room, he heard fragments of talk about numbers, whoever drew the highest number should get it; referring, as he supposed, to the verdict. T. W. Ellis swears that one of the jurors said to him that during nearly the whole time the jury were out, they were almost equally divided; there seemed no chance for them to agree, and this difference of opinion existed up to the time of their discharge and afterwards. And although he would not disclose how it was done, yet he said that the verdict was the result of chance, and not agreement among the jurors. E. W. Pridgen swears that he asked Gates, one of the jurors, how they reached a verdict, and he said that they were about equally divided until the last, and that some of the jurors were so worried and completely broken down, that they fixed up a verdict. Whilst these affidavits of the sayings of the jurors are not admissible to impeach their verdict, still that of the bailiff was, and with others, were the occasion of counter-affidavits by the jurors themselves in vindication thereof in other respects. Yet it is a most remarkable fact that no one whose affidavit is Wimpy 7s. Phinizy.

furnished either notices, replies to, or denies the truth of this charge as contained in the grounds of the motion for a new trial. We, therefore, if not driven to the conclusion that it is true, must say that there were strong and sufficient reasons under the facts to call upon them to exculpate their verdict from the taint of suspicion resting upon it.

Our judgment is, after a review of this whole case, that justice demands another trial, and a verdict returned free from the numerous doubts which environ this on all sides.

Judgment reversed.

# WIMPY vs. PHINIZY.

Where an injunction was granted against a defendant, his servants, agents, and employes, restraining them from interfering with the possession, use and enjoyment by complainant of a certain house, an attorney who represented the defendant on the hearing, and who had notice of the injunction, was bound thereby; and he could not, by virtue of subsequent employment by other parties claiming the house, take possession of the same, or put others in it.

(a.) Having done so, an order requiring him to remove the tenants put in the house by him, and return the same to the complainant or his agents, by a specified time, or in default that he be imprisoned until he should do so, was right.

Injunction. Attorney and Client. Practice in Superior Court. Before Judge ERWIN. Hall County. At Chambers. August 6th, 1881.

Reported in the decision.

W. F. FINDLEY; J. M. TOWERY, for plaintiff in error.

J. B. ESTES & SON; S. C. DUNLAP, for defendant.

JACKSON, Chief Justice.

The plaintiff in error was made to answer for contempt of the chancellor, in setting at defiance and violating an

#### Wimpy vs. Phinizy.

injunction issued against John J. Hayden and his agents, employes, etc., restraining them from all interference with a certain house until the further order of the chancellor. Wimpy, the plaintiff in error, was of counsel for Hayden, and in court when the injunction was granted at the suit of Phinizy, and yet he violated its commands by putting two persons in possession of the house. He sought to justify his conduct by the answer that he was not of counsel for Hayden when he put these people in the house, which he was enjoined not to, but was then employed by others, who had bought from Hayden before the injunction, and put them in as tenants of these purchasers. The chancellor held this answer insufficient, and granted an order requiring Wimpy to turn out the persons he had put in, or cause them to vacate the premises, so as to place the premises in statu quo, or, in default thereof, to be imprisoned until this was done. To this order he excepted.

The chancellor has the power to attach for contempt, and restore the premises to the condition they were in at the time the injunction was granted, and to enforce the restoration by imprisonment. If he did not possess it, parties and their counsel, or other employes, could defy the writ and retain the possession acquired by its defiance; and such, substantially, is the ruling of this court. 54 Ga., 257; 56 Ib., 98.

Was the excuse of the plaintiff in error good? Clearly not. He was an employe of Hayden when he and his employes were enjoined, and he could not, by changing his status and being employed by others, relieve himself of the obligation to obey the writ. It is immaterial whether he was served with it or not. He had knowledge of it in open court, and any such notice is amply sufficient to insure his obedience or incur the consequences of disobedience. 61 Ga., 164.

Besides, the employment subsequently by the purchasers from Hayden and then violating the injunction, has the appearance of a subterfuge—a sort of trick to secure

Goins et al. vs. The Western Railroad of Alabama,

possession for the original client, in the name of secondary employes.

Be that as it may, no man enjoined from interference with property by a court of chancery can be allowed, by shifting his position—his relation to the cause, even innocently of trick or contrivance, to do what he knew the court had ordered him not to do. And above all, no officer of court can be permitted to do so with impunity; and of all officers of the court, the last who should be permitted thus to violate law are those who owe allegiance and fealty peculiarly to the law, by their knowledge and learning, no less than by their high and honorable vocation of counsellors at law.

There was no error in the order of the chancellor, requiring Mr. Wimpy to restore this property where he found it when he took possession of it and wrested it, as it were, from the hands of the chancellor, or, on failure to do so, that he be imprisoned until it was done. The majesty of the law must be maintained; its mandates must be implicitly obeyed. Code, §§3237, 4216, 4218; 36 Ga., 346; 41 Ib., 446; 27 Ib., 476.

Judgment affirmed.

# GOINS et al. vs. WESTERN RAILROAD OF ALABAMA.

A passenger bought a ticket from one point to another on the line of a railroad and return. She went to the latter point, but when she started to return, the conductor informed her, on entering the car, that she could not return on that ticket; that if she did, he would have to pay the fare. She thereupon left the train, and remained until the next train, on which she returned home without extra charge. She sued the railroad:

Held, that the suit was founded on a breach of contract, and actual damages only could be recovered; or if none, then nominal damages. Exemplary damages cannot be allowed for a breach of contract.

Railroads. Damages. Contracts. Actions. Before

Goins et al. vs. The Western Railroad of Alabama.

Judge WILLIS. Muscogee Superior Court. May Term, 1881.

Reported in the decision.

SMITH & RUSSELL; S. W. GOODE, for plaintiffs in error.

JOS. F. POU; PEABODY & BRANNON, by brief, for defendant.

CRAWFORD, Justice.

The plaintiff in this case bought of defendant's agent, an excursion ticket from Columbus to Opelika and back. The price paid was one dollar. Under this contract, she went to Opelika, and was entitled to return next day; but when she got on the train, she was told by the conductor that she could not return on her ticket, and if he carried her on it, he would have to pay the fare himself. The plaintiff got off the car and remained over, in Opelika, until the next regular train, when she was carried to Columbus without further charge.

On the above facts, the judge charged the jury that, "this is a suit that arose on a contract, and was for a breach of the contract. You may find such damages as the proof shows the plaintiff actually sustained; and if no actual damages were proved, and you believe that there was a breach of the contract, you can find nominal damages only."

Although there were numerous requests to charge, which were refused, yet the plaintiff in error makes this charge, which was given, the controlling question in the case.

In the opinion of the court this case is ruled by the judgment pronounced in that of Hughes, by her next friend, vs. The Western Railroad of Alabama, reported in 61 Ga., 131, as well as by the judgment in this same case when here before, and reported in 59 Ga., 426.

#### The First National Bank of Macon vs. Ells.

The declaration in the case may be, and possibly is, framed somewhat differently, but its material allegations are substantially the same. This was so of necessity, because there was nothing in the facts, as shown by the proof, to make it otherwise than the breach of a duty flowing from a private contract, and if accompanied with damage entitled the plaintiff to a recovery. But exemplary damages can never be allowed in cases arising on contracts. Code, §\$2954, 2943.

The decisions heretofore made, and which govern this case, are supported by a similar case reported in 42 Wisconsin, 23, and in Hamlin vs. Great Northern Railway Co., 1. H. & N., 408-411. The latter case was an action for failure to perform a contract of carriage, and Pollock, C. B., says that "each case must stand on the circumstances peculiar to it; but it may be laid down as a rule, that generally in actions upon contracts no damages can be given, which cannot be stated specifically, and which naturally flow from the breach of the contract, but not damages for the disappointment of mind occasioned by such breach."

We hold, therefore, that the charge given by the judge was controlled by the law as well as the decisions of this court.

Judgment affirmed.

## THE FIRST NATIONAL BANK OF MACON vs. ELLS.

After the dissolution of a partnership, one partner has no power to bind the firm by a new contract, nor to renew or continue an existing liability, nor to change its dignity or nature.

(a.) A general power in one partner to settle up the partnership business will not be construed to include the indorsement of a new draft and its substitution for an old one previously indorsed by the firm. Such a power should be specially conferred.

(b.) A creditor of a partnership, having full notice of the dissolution of the firm and that one of the partners was to settle the firm

The First National Bank of Macon vs. Ells.

business, and having allowed such partner to make a payment on a draft indorsed by the firm and to substitute a new draft in its place without the knowledge of the other partner, could not recover against the latter.

Partnership. Contracts. Debtor and Creditor. Before Judge STEWART. Bibb Superior Court. April Term, 1881.

Reported in the decision.

HILL & HARRIS, for plaintiff in error.

WHITTLE & WHITTLE, for defendant.

CRAWFORD, Justice.

Ells & Laney, a firm doing business in the city of Macon, dissolved, and by agreement Laney was to settle up the business. The First National Bank held a draft drawn by Wm. A. Cherry on Ells & Laney, and by them accepted. After the disposition, of which the bank had notice, it allowed Laney to renew the draft, he having made a payment thereon. The renewal was made by Cherry, the drawer, and by Laney, he signing "Ells & Laney, in liquidation," and of which Ells had no notice. Upon a failure to pay the last draft, the bank sued Ells & Laney on the draft, and on open account for money furnished the firm, which was really the money originally due on the draft.

The judge to whom this case was submitted, rendered a decision in favor of Ells and against the bank.

A motion was made for a new trial on the statutory grounds, which was refused, and the bank excepted.

We think that there can be no doubt but that the judge decided the law of the case as settled in this state. Our Code, §1917, declares that, "after dissolution a partner has no power to bind the firm by a new contract \* \* nor to renew or continue an existing liability, nor change its dignity, or its nature."

#### Pearce & Reniroe vs. Reniroe Brothers.

It is maintained, however, that the power to settle up the business of the firm gave Laney the power to renew the firm debt. We think that where the statute destinctly declares that no such right can be exercised by a partner after the dissolution of the partnership, there must be some specific authority to change the rule of law. None existing in this case, the ruling was right and must be sustained.

Judgment affirmed.

## PEARCE & RENFROE vs. RENFROE BROTHERS.

- That the magistrate did not file the papers in an appeal case in the
  office of the clerk of the superior court ten days before the term to
  which they were returnable, is no ground to dismiss the appeal.
- 2. Nor is it a ground of dismissal that the justice did not send up the judgment rendered by him.
- 3. Nor that the magistrate made no proper certificate that the appellant had, within the proper time, paid the costs and given bond. When an appellant has done his duty, the mistake of the magistrate may be corrected.
- 4. The absence of an itemized bill of costs from the justice court in an appeal case may affect the recovery of such costs, but is no ground for dismissing the appeal.
- Attachments returnable to a justice court should be directed to the constables, and levied by one of them. A levy by the sheriff is bad.
- (a.) The interposition of a claim commits the claimant to the fact of the making of a levy, but not to the legality of the process under which it is made.

Appeals. Practice in Superior Court. Justice Courts. Executions. Levy and Sale. Claims. Before Judge WILLIS. Muscogee Superior Court. May Term, 1881.

Reported in the decision.

CHAS. R. RUSSELL; L. E. BLECKLEY, for plaintiffs in error.

#### Pearce & Renfroe vs. Renfroe Brothers.

## MCNEIL & LEVY, for defendants.

# CRAWFORD, Justice.

This case was appealed from the justice's to the superior court, and contains five assignments of error.

- 1. The first is, that it was not returned ten days before the beginning of the term, and, for that reason, that it should have been dismissed. That this is no good ground for dismissal was ruled in 59 Ga., 103; Ib., 578.
- 2. The magistrate having failed to send up the judgment rendered by him with the file of papers, it was for that reason moved that the case be dismissed. This was likewise refused. There was no error in this ruling. An appeal to the superior court is a *de novo* investigation. It is, therefore, the action that is examined, and not the judgment. Code, §3627; 60 Ga., 221.
- 3. The third assignment of error was, that there was no proper certificate by the magistrate that the appellant had, in the proper time, paid the costs and given bond, as required by law. Had there been any defect in transmitting the appeal up to the superior court, the same could have been corrected, provided the party appealing had done all which the law required of him. It was not, therefore, any good ground upon which to have dismissed the appeal. II Ga., 39; 31 Ib., 358; 63 Ib., 496.
- 4. There being no itemized bill of costs sent up by the magistrate, it was, for that omission, moved to dismiss the appeal, which motion was overruled, and this is assigned as error. The only effect of this failure, unless cured before final judgment in the superior court, would be to cause the loss of the costs to the appellant, if he obtained a verdict in his favor in the superior court. This ruling was not error.
- 5. This suit was by attachment for less than \$100.00, and made returnable to a justice's court; it was directed to all and singular the sheriffs and constables of the state,

Pearce & Renfroe vs. Renfroe Brothers.

and levied by the sheriff, for which reason a motion was made by the claimant to dismiss the levy. This motion was sustained, the levy dismissed, and the ruling assigned as error.

Attachments returnable to a justice court should be directed to the constables only, and levied by the officer to whom directed. Code, §§3273, 3284.

Misdirection in attachment is amendable, and if levied by the proper officer, the proceeding is not void. 63 Ga., 227, 428.

Process returnable to a justice's court must be served by a constable. Code, §4142. Constables cannot be sheriffs, nor can sheriffs be constables. Code, §470.

"A levy by an officer who has no authority is the same as no levy. Under section 888 of the Code, the sheriff had no authority to levy a tax execution when the principal amount did not exceed fifty dollars." 60 Ga., 466.

It is, however, contended by counsel for plaintiff in error, that a claimant is estopped from denying the levy, because he must admit that there was one, before he has any of the rights of a claimant. We think this correct, and means only that after he has sworn that the property seized, if personal, was his property, and the bonds given under the claim laws being an admission upon his part that the property claimed was so seized, that then it would be absurd to allow him to come into court and deny his oath and the obligation of his contracts. But the seizure, or levy, is one thing, and the mandate of the court by which the act is done is altogether another and quite a different thing. And so, also, is the authority by which the officer, as such, makes the seizure. But this view of the case was considered wholly immaterial by the very learned counsel who argued it, and it was most earnestly maintained that the claimant could not deny that the levy was a legal levy, although it might have been made by himself or any other wholly unauthorized person. We cannot so hold. Nor do we think

that this view is at all inconsistent with the cases in 54 Ga., 297, and 59 Ib., 849. The question in the first case was, whether the levy was complete, the possession being the point of the levy. Of course it did not lie in the mouth of the claimant to deny that which he had sworn was true, and, to relieve the property of the levy or seizure, had entered into bonds for its forthcoming, and damages for any unlawful delay in stopping the sale.

In the second case the question was, whether the levy had been made on the property of the defendant in fi. fa., the sheriff not having stated in his entry thereof, "as the property of the defendant in fi. fa." The claimant, however, having sworn that the property levied upon as defendant's was not his, but that of himself, the claimant, he was estopped from denying the truth of his oath. We cannot see any analogy between the cases.

Judgment affirmed.

# THE MERCHANTS' AND MECHANICS' INSURANCE COM-PANY vs. VINING & BROTHER, for use.

- The charges of the court complained of were not unfounded on evidence.
- (a.) Where the agent of an insurer asked the insured, upon the renewal of the policy, if the risk was about the same as before, and upon an affirmative answer being given, entered the amount in a blank in the application, the jury might infer that he knew what it was before, and a charge based on that hypothesis was not error.
- 2. If the assured did not know the value of property on which he desired insurance, but bona fide stated such value on information, and so informed the insurer or its agent, the falsity of the information would not avoid the policy.
- An absolute refusal to pay on the part of an insurer waives preliminary proofs.
- 4. A refusal by an insurer to settle with the insured or to fix the amount of liability, if any, during the pendency of certain garnishments, would waive proofs of loss during that time.
- 5. The verdict is supported by the evidence.

Insurance. Charge of Court. Principal and Agent. Waiver. New Trial. Before Judge WILLIS. Muscogee Superior Court. November Adjourned Term, 1880.

Reported in the decision.

PEABODY & BRANNON, for plaintiffs in error.

BLANDFORD & GARRARD, for defendants.

CRAWFORD, Justice.

Vining & Bro. sued The Merchants' & Mechanics' Insurance Company of Virginia, to recover their losses on policy given to them by that company. The jury gave a verdict against the company; a new trial was refused, and the case is brought up upon the charge of the court, and because the finding was decidedly and strongly against the weight of the evidence and the principles of equity and justice.

- (I.) The first error complained of in the charge is that the judge instructed the jury, "If the company or their authorized agent examined the goods at the time they were insured, or knew the amount of goods insured, and made no objection to the amount represented by the assured, then they cannot set up the fact that they were insured for too much, and that the policy is therefore void."
- (2.) "If the party seeking the insurance does not know the amount or value of the property insured, but makes a statement of the value on the representations of others bona fide, and so informs the insurer or his agent, the falsity of the information does not void the policy."
- 1, 2. The objection urged to these two charges is that there is no testimony to authorize the judge to give them.

The testimony of D. M. Vining is that the firm had kept their goods insured with this company; that it was represented by Mr. Andrews, as agent, who came to Rut-

ledge, their place of business, once or twice a year, and was in their store; the last time he came, he notified witness that their policy had expired, and asked if they wanted it renewed; witness told him that they did want it renewed, and he signed an application in blank at his (the agent's) instance; he asked witness if the risk was about the same as before, and witness told him that it was. Andrews, the agent, filled out the application. The facts stated in answer to the questions were true, as near as witness could have stated them himself.

On this testimony, we hold that the charges given were not without authority. The agent asked the assured if the risk was about the same as before; this being a renewal, the jury had a right to infer from the conversation that he knew about what the risk was; and if he made no objection, of course his principal had no right to claim that the policy was void for any such reason. 62 Ga., 515.

And if the assured did not know the exact value of the property insured, and made a bona fide statement of the value, although it may have been on the representations of others, and so informed the insurer or his agent, the falsity of the information does not void the policy. Whilst the testimony does not make exactly this state of things, yet the evidence is clear that the agent was satisfied with what he saw or had seen, and that if there were fault on his part, and none shown on the part of the assured, it did not lie in the mouth of the company to set it up against the plaintiffs.

(3), (4.) Because of error in the following charges, in that there was no such absolute refusal to be inferred from the testimony: "An absolute refusal to pay, waives a compliance with the regulations of the company as to notice and preliminary proofs of loss."

"An absolute refusal to pay for any reason waives a compliance with the regulations of the company as to notice and preliminary proofs."

3, 4. The testimony shows that an agent of the company





went to adjust the loss a day or two after the fire in January, 1879. In February or March D. M. Vining, one of plaintiffs went to see Mr. Willcox, the agent of the company, who notified him that he could not pay the claim as it had been referred to their attorneys, and they would have to adjust it. Very soon thereafter Mr. McHenry, the attorney of the plaintiffs, called on the company represented by Mr. Willcox, who understood that he had brought the proofs of loss with him, but something was said about the garnishments, and they then went to Mr. Garrard's office. Afterwards Mr. Garrard, as attorney for the plaintiff, called on Mr. Willcox with the proofs, who said that he had been garnished, and could not settle with Mr. Garrard tried to get him to agree upon the amount of loss, but he said he could do nothing while he was garnished. The proofs of loss were not therefore presented, but were filed the latter part of April or first of May, and the suit was not brought until the twentieth day of October following.

These facts constitute an absolute refusal to settle the amount of the loss, or to pay to the assured, even if the proofs had been then submitted, and were at least sufficient to base a charge upon to that effect. And beyond question they amount to a waiver of all proof of loss during the pendency of the garnishment. A refusal to pay, is a refusal to pay; and whether for a good or bad reason puts each party on its independent rights under the law and the contract. If, therefore, the plaintiffs complied with their part of the contract by filing the proofs of loss in April or the first of May, and did not sue until the last of October, they lost none of their rights; the more especially when they were notified by the company that they had referred the matter to their attorneys first, and then that they would not settle while the garnishments were pending. Code, \$2813; 53 Ga., 535-[6.]

(5.) The last ground taken is that the verdict is strongly and decidedly against the weight of evidence, and contrary to the principles of equity and justice.

5. The verdict was for \$1,000.00. The calculations of the different witnesses reached different results. According to one view the amount of the loss was only \$692.41; according to the testimony of another witness it was \$1,500.00; which was right, was a matter for the consideration of the jury, and they have said \$1,500.00, and that \$1,000.00 being the amount of the policy, the plaintiffs are entitled to that much. Juries weigh evidence.

Judgment affirmed.

# AUSTIN et al. vs. RAIFORD et al.

- 1. Where the security on the bond of an administrator, as agent for the administrator, held certain property of the estate, and after the death of his principal accounted and settled fully and without fraud or collusion with the administrator de bonis non, the general distributees are bound, and cannot hold such security to account directly to them.
- The discharge of an administrator from liability on his bond discharges also his securities.
- Where a right of action accrued against an administrator and his surety prior to 1865, and no suit was brought until October, 1875, the action was barred.
- (a.) Fraud to relieve a case from the bar of the statute must be such as involves moral turpitude. Mere errors or inaccuracies in accounts, without more, is not sufficient.

Administrators and Executors. Principal and Surety. Non-suit. Statute of Limitations. Before Judge WILLIS. Muscogee Superior Court. May Term, 1881.

Reported in the decision.

THORNTON & GRIMES; BLANDFORD & GARRARD, for plaintiffs in error.

D. H. Burts; Peabody & Brannon, for defendants.

SPEER, Justice.

This was a bill filed in Muscogee superior court, on October 4th, 1875, in which the complainants show that their father, A. B. Austin, died in Chattahoochee county, Ga., in the fall of 1860, leaving a large estate consisting of negroes, lands, stock of various kinds, cotton, cash and That on December 3d, 1860, one debts due the estate. John Bonnell became administrator, with W. W. Shipp his only security. That the negro property was divided among the heirs, and that on December 20th, 1860, the perishable property sold for \$2,959.50. That on first Tuesday in October, 1861, the real estate was sold by the administrator, and was bought by W. W. Shipp, his security, for \$3,401.00. That Bonnell return June 22d, 1861, showing receipts of \$1,814.96 and disbursements of \$1,006.27. That Bonnell made return May 10th, 1862, showing receipts of \$3,464.06, and disbursements of \$603.50. That Bonnell, the administrator, went to the war, and that Shipp, the security, took entire control and management of the property. That Bonnell died in Richmond, Va., July 9th, 1864. That said estate from that date to July 30th, 1866, was entirely unrepresented. That the same remained in the possession of Shipp, the security, and purchaser of the real estate. That on the last mentioned date, July 30th, 1866, E. G. Raiford, then of Chattahoochee county, but at the time of the filing of this bill, a citizen of Muscogee county, was appointed administrator de bonis non of said estate, with W. W. Shipp his security. The bill prays for an account and settlement, and a discovery as to the amount of said estate in the hands of Shipp, and what amount in the hands of Raiford, and that each may be decreed to pay the heirs whatever amount may be coming to them.

Raiford, by his answer, admits that Shipp was his security, and as such he (Shipp), in the fall of 1866, turned over

\$986.39, most of which were insolvent, and certain certificates of money to buy Confederate bonds, amounting to \$700.00, that he has paid out all moneys collected, appending his return as part of his answer.

Shipp answered that he was security for both Bonnell and Raiford, as charged; that as agent of Bonnell he held the assets until July, 1864, when Bonnell died. When Raiford was appointed in July, 1866, he turned over to Raiford all the assets in his hands, and that in the summer of 1866 he bought out most of the heirs for small sums, \$40.00 or \$50.00 each, and attaches their receipts as exhibits to his answer.

Complainants amended their bill by alleging that Shipp purchased the lands of the estate for \$3,401.00, and he has never paid for the same to the administrator or either of them. Also, Shipp, in obtaining the interest of some of the heirs, made false and fraudulent representations, that the whole of the estate was lost by the results of the war, and they, relying upon these statements, and being ignorant of the facts, sacrificed their interests by selling to him.

Shipp, in his answer to the amended bill, replied that there were losses to said estate from the war, and denied making fraudulent or false representations to obtain the transfers of complainants' interest.

Upon the trial complainants introduced in evidence the answer of Raiford, which set forth his appointment as administrator *de bonis non*; a settlement with Shipp as security on Bonnell's bond, and his full accounting with the estate for all sums collected by him. They also swore Raiford as a witness, who testified of his full settlement with Shipp, and of his full administration of all assets in his hands, as appeared by his returns, and also of Shipp's purchase of the interest of some of the heirs.

The testimony of some of the complainants was also read, testifying that they had received nothing from the estate v 68-15

since the war, and denying they had sold their interests, etc.

Mrs. Bonnell denies the \$400.00 charged to her came from the estate, but was for land sold by her husband to Shipp. That Shipp alone managed the estate after her husband went to the war.

Horn and Thompson, who married two of the complainants, testified Shipp represented the estate was worth but little or nothing by the results of the war, and they were thus induced to transfer their interest to him.

Copies of inventories and appraisement, sale bills and returns of the estate were also offered in evidence by complainants.

Defendant, Shipp, pleaded by way of defence, the purchase of their interest in the estate from certain heirs, and also, he relied upon the statute of limitations of 1869, and the statute of ten years, and offered no evidence. After the evidence closed, defendants moved to non-suit the cause, which motion the court granted, and complainants excepted.

1, 2. The record does not disclose upon what ground the court non-suited the complainants' cause, or more properly speaking, dismissed complainants' bill. But if the judgment was right on any ground, as shown by the record, it should be affirmed.

We presume it will not be insisted that there should have been any recovery as to Raiford. By his return and his evidence, introduced by complainants, it is clear he had fully administered the assets that came to his hands as administrator de bonis non; and there was no evidence to contradict it. His discharge operated to the discharge of Shipp, the security. But his testimony established the further fact, that he, as administrator de bonis non, had a full settlement with Shipp (who held the assets of the estate as security of Bonnell, deceased), of all that were unadministered in his hands, and this he had a right to do. See Code, §§2514-15; 60 Ga., 658.

The returns made by Bonnell, as administrator, and by Raiford, administrator de bonis non, put in evidence by complainants, both established the fact that the estate had been fully administered, except as to the insolvent debts, which were returned as such by the administrator, and the return approved by the ordinary. What was the legal effect of the settlement had between Shipp, the security, and Raiford, the administrator de bonis non, as to Shipp's liability on his bond as security for Bonnell? This court held, in 63 Ga., 369, that, "after the representatives of a deceased co-executor, who died testate, has duly accounted with the survivor without fraud or collusion, the general legatees are bound, and cannot hold said representative to account over directly to them." To apply this principle, for by our statute the same rule appliesboth to executors and administrators, if Raiford, the administrator de bonis non, has had a full accounting with Shipp, who, as security, represented Bonnell, without fraud or collusion, then these complainants can no longer hold Bonnell accountable directly to them. This full accounting between Shipp and Raiford, if without fraud or collusion, precludes the complainants from holding Bonnell further to account, and if Bonnell, the administrator, is not liable, neither could the security be held responsible after this full settlement without fraud or collusion.

3. But apart from this view of the case, what was the effect of the plea of the statute of limitations filed by the defendant?

The death of the intestate occurred in 1860. The cause of action of these complainants, as against Bonnell, the administrator, and Shipp, his security, accrued prior to 1st June, 1865, and this being so, their rights were barred by the act of 1869, unless they could show, in the management of said estate, fraud and corruption on the part of the administrator. 62 Ga., 123, 574.

We have examined with care both the charges and

evidence submitted, and cannot see any fact or circumstance that even tends to show fraud or corruption on the part of this administrator. We admit that this is a question for the jury. But in the absence of all evidence on this point, there was no issue of this kind for the jury to pass upon. A mere mistake in the addition of the returns on the record, or irregularity, would not be such fraud or corruption as is contemplated by this exception in the statute. It must be such "fraud and corruption" as imputes moral turpitude to the conduct of the administrator; otherwise he can claim the exemption from liability to a suit that the act of 1869 secures to him against causes of action prior to 1st June, 1865, unless suit was brought thereon by 1st January, 1870.

In both views of this cause, whether the complainants' bill was dismissed from the want of evidence to make these defendants' liable, or whether, for the reason that complainants were, under the proof, barred by the act of 1860, we are of opinion that the judgment of the court, dismissing the bill, was right. We would not be understood as holding that, where even a prima facie case is made in behalf of the plaintiff, the court should award a non-suit at law or dismiss a bill in equity. But if the evidence is such that, admitting all the facts proved and all reasonable deductions from them to be true, the plaintiff, on all the proof, ought not to recover, then the cause should be nonsuited or dismissed. 15 Ga., 491. Here the evidence showed that the proceeds of the sale of this land had been paid to complainants by the administrator, and that all the other assets from the returns had been duly administered and accounted for; this proof was made by the complainants, and there being no conflict in the evidence, nor fraud or corruption proved in the management of the estate, we think the cause of action was not sustained by the proof; but, also, that the act of 1869 barred the complainants.

Let the judgment be affirmed.

Moughon et al., for use, vs. Brown.

# MOUGHON et al., for use, vs. Brown.

- I. A material variance between a f. fa. and the judgment on which it is founded, is good ground for quashing the former, or rejecting it when offered in evidence in a claim case arising thereunder.
- 2. A suit being in the name of M. and N., surviving executor and executrix of B., for the use of another, the judgment being for the plaintiffs, and the fi. fa. being in the name of M. and N., for the use of the same party, the variance was not material.

Judgments. Executions. Administrators and Executors. Evidence. Before Judge FLEMING. Baker Superior Court. May Term, 1881.

Reported in the decision.

WARREN & HOBBS; O. G. GURLEY; D. H. POPE; D. A. VASON, for plaintiffs in error.

J. L. HAWES; C. B. WOOTEN, for defendant.

CRAWFORD, Justice.

A suit was brought by Wm. S. Moughon and Henrietta S. Nelson, surviving executor and executrix of Jos. Bond, deceased, for the use of Maria L. Nelson, against the administrators of J. T. Brown, deceased. They recovered judgment thereon, which was entered up in favor of "the plaintiffs," without other or descriptive words. A f. fa. was issued thereon, in favor of Wm. S. Moughon and Henrietta S. Nelson, for the use of Maria L. Nelson, and levied upon certain property, which was claimed by M. A. Brown. Upon the trial of this case, when the fi. fa. was offered in evidence, it was objected to by the claimant, because it did not follow the judgment, in that the words "surviving executor and executrix of Jos. Bond, deceased," were omitted therefrom. The judge held the objection good, and rejected the fi. fa. This is the error assigned.

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All executions must follow the judgments from which they are issued, and describe the parties thereto as described in such judgment. Code, §3636.

Whilst it is undoubtedly the law that all fi. fas. must follow the judgments upon which they are issued, yet this court has construed that section, and held that any variance between the execution and the judgment, to authorize the execution to be quashed or otherwise bad, must be a material variance. 39 Ga., 565.

The whole question, therefore, in this case turns upon the materiality of the words omitted from the fi. fa., and this in turn depends upon whether the legal title to the notes sued, and the judgment rendered thereon, was in Moughon and Nelson, as executor and executrix of Jos. Bond, deceased, or in themselves as individuals. If in them, as the executor and executrix of Bond, then the fi. fa. was bad; if in them personally, then it was not. It appears from the pleadings in this case, that the contract sued upon was one made directly with them, and payable to them, and not with the testator, or payable to him.

On a note made payable to an executor, as such, he may sue upon it in his own name, and if sued as executor, it is only a *descriptio personæ*, and may be rejected as surplusage.

A judgment recovered by an administrator, as such, is a debt to himself personally, and upon which suit may be brought in his own name. 5 Ga., 60-61. That the use of the words named are wholly immaterial, whether in or out of the execution or the pleadings, may be seen by reference to any standard authority. The question was considered at great length, and decided as early as 5 Ga., in the case of Oglesby vs. Gilmore et al., page 56, and is supported by an overwhelming list of authorities. Holding, then, as we do, that the variance was not a material one, we reverse the ruling, and send the case back for another trial.

Judgment reversed.

Merritt vs. Gill, administrator.

## MERRITT vs. GILL, administrator.

- 1. The issue being whether a judgment had been fully discharged or not, the defendant introduced a receipt for a certain sum, which recited on its face that defendant claimed this to be all that was due, and that the balance apparently due had been discharged by a certain auditor's report and decree rendered on a bill in equity, while plaintiff claimed that said decree and report did not bind him:
- Held, that the record in such case was not only admissible, but essential to a determination of the issue.
- 2. While generally judgments are conclusive between parties and privies, yet on a bill by an administrator to marshal assets and to determine the priorities of creditors and the mode of distribution among them, their rights are involved, and courts of chancery will inquire into the justice and equity of their claims, though one may be in judgment.
- (a.) Especially will such inquiry be proper as to equities arising since the rendition of the judgment.

Evidence. Judgments. Administrators and Executors. Equity. Before Judge WILLIS. Marion Superior Court. April Term, 1881.

Reported in the decision.

S. C. ELAM; L. E. BLECKLEY, for plaintiff in error.

BLANDFORD & GARRARD; MILLER & BUTT, for defendant.

SPEER, Justice.

The defendant in error, J. M. Gill, administrator of C. J. Baldwin, deceased, caused to be levied, on the third day of August, 1877, a fi. fa., in his favor, issued on the 28th day of April, 1877, from Marion superior court, against Thomas M. Merritt, on certain lots of land as the property of the defendant. To this levy the defendant in fi. fa. interposed his affidavit of illegality, alleging that the judgment on which the fi. fa. issued had been fully paid to the

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An issue having been tendered, a jury was plaintiff, Gill. The fi. fa. and levy having, by plaintiff, empanneled. been read to the jury, and he then closing, defendant moved to dismiss said levy, because plaintiff had not shown that the defendant in f. fa. had been in possession of the land levied on at any time since the rendition of the judgment which motion the court overruled, and defendant excepted.

Counsel for defendant then offered, and read in evidence. the following receipt:

- "I. M. Gill, administrator of Charles J. Baldwin, deceased,
- T. M. Merritt, administrator of W.
- Judgment and f. fa. in Marion Superior Court. \$222.50 prin., besides interest and cost. H. Merritt, deceased.
- I. M. Gill, administrator of Charles ) .J Baldwin, deceased. vs. T. M. Merritt.

Judgment and f. fa. in Marion Superior Court. \$222.50, prin., besides interest and cost.

Received of T. M. Merritt, as administrator upon the estate of W. Merritt, deceased, the sum of two hundred dollars, on the above judgments; T. M. Merritt insisting that nothing more is due upon said judgments, according to an auditor's report in the case of T. M. Merritt, administrator of said W. H. Merritt, deceased, vs. J. M. Gill et al., bill to marshal assets, etc., in Sumter superior court; J. M. Gill denying that he is in any manner bound by said auditor's report, and the reception of this two hundred dollars shall in no manner whatever estop the parties as to any of their rights in said judgment. This 11th May, 1878. JACK M. GILL, Administrator."

On the reading of said receipt, defendant in f. fa. was sworn as a witness in his own behalf, and proposed to testify that, in the event Gill, the administrator, is not bound by the auditor's report alluded to in the receipt just read, he wished the two hundred dollars mentioned in said receipt to be applied to the fi. fa. against him individually now here, which testimony the court rejected, and defendant excepted.

Defendant further proposed to prove that Gill, the administrator of Baldwin, owed the estate of his intestate

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(Merritt) forty dollars, and he elected to apply this sum to the fi. fa. levied, which evidence the court rejected, and defendant excepted.

Defendant introduced the original fi. fa. of J. M. Gill, administrator of C. J. Baldwin, deceased, vs. Thomas M. Merritt, administrator of Wade H. Merritt, deceased, for the sum of \$222.50, principal, besides interest and cost, issuing from Marion superior court, and dated April 28th, 1878.

Defendant then offered to read the interrogatories of Dupont Guerry, to prove the fact that, as counsel for plaintiff in execution, he represented him, as administrator, in a bill in equity filed in Sumter superior court, "for relief, injunction," etc., wherein Thos. M. Merritt was complainant, and various parties, including Gill, the administrator of Baldwin, were defendants, the bill being filed by Mer, ritt, as administrator, to marshal the assets of said estate.

Plaintiff in error also offered in evidence the exemplification of the bill, answers, auditor's report, verdict and decree thereon, filed in Sumter superior court, in favor of Merritt, administrator, vs. Gill, as administrator, et al.; also, the record of the submission, award and judgment on the same, between the same parties, from which the fi. fa. levied issued from Marion superior court, said record evidence being offered to support the defendant's illegality, and as relevant to explain and determine the effect of the receipt already in evidence. On objection made, this evidence was excluded by the court, and defendant below excepted, whereupon defendant closed, and the jury returned a verdict in favor of the plaintiff in fi. fa.

The controlling question in the cause presented here, is, was the exclusion of these records as evidence error.

The facts set forth in the records were, in substance: That Gill, as administrator of Baldwin, had brought his action against Merritt, as administrator, to recover of him certain lands lying in Marion county; that the case was, by a submission between the parties, referred to arbitra-

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tion; that the arbitrators had made an award, adjudging that the lands in controversy should be returned to Gill, as administrator, and that he should recover out of the estate \$223.50, as rents of said lands for the years 1872-3. and a like sum out of Merritt individually, as rents of same lands for the years 1874-5; that said award was returned to Marion superior court, and exceptions to the same were filed by Merritt, as administrator of W. H. Merritt; that while this issue was pending, Merritt, as administrator, filed his bill in Sumter superior court for relief and injunction, and to marshal the assets of the estate of his intestate, Wade H. Merritt, to which the creditors of the estate were made defendants, including Gill, as administrator. The bill alleges the insolvency of the estate, attacks the award made by the arbitrators, then pending in Marion superior court, and claims his intestate was the owner of one-sixth interest in the lands recovered by said award, in the purchase by his intestate, in his lifetime, of the share of one of the heirs at law of Gill's intestate. He avers that he has sold all the property of his intestate, and paid out all the money received; asks for a full and thorough investigation of all his acts as administrator, and for the aid and protection of the court as to his duty in paying the indebtedness of the estate, as to priorities, etc.; prays the award may be set aside, and the lands recovered may be restored to the estate. He also sought an injunction against the creditors of the estate, and against Gill, as administrator, from prosecuting the award complained of; asks for the appointment of an auditor to examine into the condition of the estate, its liabilities, and priority of creditors, and report thereon. The record further shows that Gill, as administrator, answered the bill. On the hearing of the injunction, the court granted the same as against the defendants, except as to the land claim of Gill, in Marion superior court. The record shows that the award pending in Marion superior court was, after this, made its judgment, at April term, 1877.

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Under the bill filed, an auditor was appointed, and notice was given by him to all creditors, including Gill, as administrator, to appear before him, at a time and place, for an examination of the questions made in said bill.

On the hearing had before the auditor, the award of Gill being before him, with other proofs, the auditor reported, as the result of his investigation: "That the award made against Merritt, as administrator and individually, should be credited with \$200.00, it being the onesixth of the value of the land contained in the award, the same having been sold since said award, by Gill, as administrator, at the price of \$1,200.00; that the award should further be reduced by one-sixth of the amount recovered in said award as mesne profits, being one-sixth of the \$445.00 recovered in said award, and which left the amount due to Gill, as administrator, on said award, or judgment thereon, the sum of \$200.00, and which the administrator was directed to pay out of the estate." report was submitted to a jury, who rendered a verdict sustaining the same, and a decree was accordingly entered thereon, confirming the same.

The question submitted for review is, whether the court erred in rejecting said record (in which was set forth the foregoing facts, and the report, verdict and decree thus rendered on said bill) from the jury, or was the same relevant to the issue on trial, and admissible as evidence. We do not understand why the terms of the written receipt in evidence, given by Gill, as administrator, and received by Merritt, as administrator, of itself does not require the admission of this record and judgment. The receipt shows the payment of \$200.00 by Merritt to Gill, as administra-Merritt paid the amount, and in said receipt claimed "that nothing more is due on the judgments rendered on the award, according to the auditor's report." Gill receives the \$200.00, denying he is "in any manner bound by said report." In view of the receipt given, and the issue between them as to the effect of the decree, we think the

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defendant in fi. fa. was entitled to have this record, and judgment thereon, admitted in evidence, that the jury, under the instructions of the court, might determine whether the same was not a satisfaction of the judgment on the award, either total, as claimed by defendant, or only partial, as claimed by the plaintiff below. We are of opinion this evidence rejected was a necessity, for the court and jury to decide intelligently the question thus raised by the parties in this receipt, and which could alone be decided by the record itself.

The decree thus sought to be introduced, it must be remembered, was rendered since the judgment on the award on a bill filed by Merritt, administrator, vs. Gill and others, to marshal the assets of the estate, and to seek the aid and direction of the court in the settlement of all claims against the estate, according to their amounts and priorities. To this bill, Gill, administrator, was a party, and he had due notice of the hearing before the auditor. Under such applications to a court of chancery, the court will look "to the equities of creditors," in whatever form their claims may be presented, and decree accordingly. Admitting, as a general rule, that judgments rendered are usually final and conclusive between parties and privies, yet on a proceeding to marshal the assets of an insolvent estate, when the rights of other creditors intervene and the powers of chancery are invoked to settle the debts of creditors on an equitable basis, we know of no rule or principle in equity that would prevent a chancellor from making inquiry into the justice or equity of a judgment, however solemnly pronounced, and especially to set up an equity arising since the award. The plaintiff below, before he obtained his final judgment on the award, had notice of this bill, and that it sought to avoid the award he was pressing to judgment in a court of law, and to set off against this award an equity in favor of the estate of Merritt's intestate, and an equity that Merritt could not avail himself of by pleading in the court of law where the award was pending.

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he chose to go forward and press his award to a judgment in a court of law, he took it subject to such decree as would be finally rendered on the bill of the administrator pending. Under this view, we see no reason why this final decree in chancery is not binding as to him. If it be true. as this decree recites, that he is indebted to the estate of Merritt \$200.00, for its interest in the land sold by Gill, as administrator, and also in the sum of one-sixth of the mesne profits he, Gill, recovered in the award and judgment thereon, we think it clearly competent for the court of chancery to decree that his judgment should stand credited with these sums, and permit him alone to recover the balance due. The bill was filed to complete the administration of Merritt's estate equitably among all the creditors, and when equity assumes a task of this kind, its rule is to furnish, not partial but "full and complete relief" to its suitors to the final consummation sought. Its object in such cases is to administer an estate where the ordinary process of law "would interfere with the due administration," and in doing so the court will seek to administer it in a spirit of "equity to all the creditors."

With these views, we think the court erred in ruling out this testimony, so important to the protection of the administrator and to the equities of other creditors.

Judgment reversed.

## O'Bryan & Brothers vs. Calhoun.

An ordinary affidavit of illegality is sufficient to raise the question of service where there is no official return thereof. But where there is such a return, a traverse must be filed thereto at the first term after notice of it. Such traverse may be included in an affidavit of illegality, but proper steps must be taken to make the officer making the return a party.

Illegality. Pleadings. Parties. Service. Before Judge FAIN. Bartow Superior Court. January Term, 1881.

O'Bryan & Brothers vs. Calhoun.

Reported in the decision.

AKIN & AKIN, for plaintiffs in error.

TRIPPE & NEEL, for defendant.

SPEER, Justice.

On the third day of February, 1880, O'Bryan Brothers recovered judgment in Bartow superior court against Robert S. Philips, John J. Calhoun and Thomas Tumlin. Fi. fa. issued, and on 31st March, 1880, was levied upon certain lands as the property of defendants.

On May 4th, 1880, one of the defendants, Calhoun, filed his affidavit of illegality to said levy upon the following grounds:

- (1.) "Because deponent was never served with a copy of the original declaration and process, nor did he ever waive the same, nor did he ever appear and plead in the action on which is founded the judgment from which said fi. fa. was issued; and deponent further says under this ground of illegality that he never knew until to-day that the former sheriff of said county, James Kennedy, had made his entry of service on deponent by leaving a copy of the original declaration and process at deponent's most notorious place of abode; and deponent hereby traverses said entry of service and says the same is not true."
- (2.) "Deponent further says that he had a good defence to the action on which said judgment was obtained from which said ft. fa. issued, on the ground that deponent never signed or authorized anybody to sign for him the notes on which said action was brought, and defendant would have filed the plea of non est factum in said action had he known that the same was brought against him with said Tumlin and Phillips, returnable to the said court at the time it was made returnable; and deponent hereby prays the court to set aside said judgment and quash said ft. fa. and allow defendant to file his plea of non est factum against said action on said notes."

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To this affidavit of illegality the plaintiff below demurred on the ground, that it showed a return of service by the sheriff, which return could not be set aside by affidavit of illegality, but only by a traverse of such return duly made. Because, as a traverse of the sheriff's return of service, it is defective because the sheriff has not been made a party thereto. Which demurrer the court overruled, and plaintiff excepted.

Section 3340 of the Code provides: "The entry of the sheriff (or any officer of the court) may be traversed by the defendant at the first term after notice of such entry is had by him, and before pleading to the merits, but this shall not deprive the defendant of his right of action against the sheriff for a false return."

In the case of Lamb vs. Dozier, 55 Ga., 677, this court held, that where the affidavit of illegality was based upon the want of service, and the return of the sheriff was that the defendant was served, and there was no traverse of this return shown by the pleadings, so that the record should show that such traverse had been made,

was necessary that the sheriff whose return was attacked should be made a party to the traverse and heard thereon. See also 55 Ga., 396. So in 59 Ga., 461, in the same case it was held that: "An affidavit of illegality which alleges that the defendant was never served with any copy of the declaration and process, and never knew of the suit till long after judgment was rendered, is sufficient." Such an affidavit raises the question of service to be tried under the rules of evidence applicable thereto, one of which is that an official return, unless traversed in due time and proved false, is conclusive.

If the defendant rests alone upon his affidavit of illegality averring want of service, and there appears in evidence a proper return of service by the officer, then this would be conclusive upon the defendant, and to meet this a traverse of said return with proper parties would be the. proper remedy. O'Bryan & Brothers w. Calhoun.

Under the authority of these decisions, we think that an affidavit of illegality would be sufficient to raise the question of service, if there were no official return to be traversed. But where it appears, as in this case, by the affidavit of illegality, that there is a return by the officer, if the defendant intends to attack the verity of such return, he must take steps by filing a traverse thereto and by order to make the sheriff a party. It is true, as in this case, the defendant may include in his affidavit of illegality a traverse of the truth of the return as referred to therein, but that is not enough; when such traverse of the return is made in the affidavit, he should proceed further to make the officer whose return is thus impeached a party, that he may be heard. He and his securities on his bond have a vital interest in the question thus made, and they should have an opportunity to be heard on the issue defendant has made.

As no steps were taken by the defendant below or proceedings sought to make the sheriff a party, and as the case is now presented by the record before this court, we are of opinion that the demurrer should have been sustained, and the court erred in overruling the same. But we direct, in view of the facts, that the defendant below be allowed, when this cause is returned to the court below, if he chooses so to do, either to amend his traverse, or institute such proceedings under the order of the court as will bring the officer before the court as a party to said traverse, whose return is the subject of attack, subject of course to such exceptions and demurrers as plaintiff below may offer to the same.

Let the judgment of the court below be reversed, subject to the direction herein given the cause when returned to the court below.

Judgment reversed with directions.

# THE GEORGIA SOUTHERN RAILROAD COMPANY vs. BIGELOW.

- I. Where the receivers of a foreign railroad operated a connecting railroad in this state as part of a through line, under a contract by which they were to operate the Georgia branch under the laws of Georgia, furnish their own rolling stock, for which the Georgia road should pay a certain amount, that each road should contribute its proportion of the expenses, and the net proceeds should be divided pro rata, a depot agent on the line of the Georgia corporation was such an agent of that company as could be served with process against it, though he might have been employed by the receivers and made remittances to them, by whom the proceeds were afterwards distributed under the contract.
- (a.) Especially was such service good when re-enforced by service on the sole resident director of the Georgia corporation.
- 2. A railroad ticket issued during the day of December 6th, and limited to be used within two days from the date sold, did not expire until 12 o'clock on the night of December 8th.
- The verdict in this case is not so excessively large as to justify the inference of gross mistake or undue b:as.

Railroads. Principal and Agent. Contracts. Damages. Verdict. Before Judge UNDERWOOD. Floyd Superior Court. September Term, 1880.

Reported in the decision.

D. S. PRINTUP, for plaintiff in error.

C. ROWELL; JOEL BRANHAM, for defendant.

SPEER, Justice.

Thomas A. Walker and John Tucker, receivers of that portion of the Selma, Rome and Dalton Railroad lying in Alabama, appointed by the chancellor of the middle chancery division of Alabama, applied to the chancellor for leave to lease that portion of the road lying in Georgia which had been sold under a decree to Edward D. Cow-

man. After various applications, modifying orders, etc., upon the report made by a register appointed for that purpose by the chancellor, and by his consent and approval, on the 20th of April, 1876, the receivers and Cowman entered into an agreement, by which "the receivers of the Selma, Rome and Dalton Railroad were to operate the whole line on their own account, and for the other contracting party for one month, and from month to month until dissolved." The said agreement provided that the receivers should operate the Georgia end in connection with the Alabama portion of the road, as required by the laws of Georgia, run trains over it as receivers, subject to the following conditions and stipulations: "This was to be done at the expense of the Georgia Southern, and in no event is the Selma, Rome and Dalton Railroad in Alabama, or any of the assets in the hands of the receivers, to become liable in any manner for the operation of said road. The Georgia Southern was to bear its proportion of operating expenses of the whole line (28 4-7 per cent), and pay \$1,000.00 per month for use of the rolling stock," and the Georgia Southern was to receive the same per cent of the net earnings of said whole line after deducting expenses and monthly rentals. Under this agreement the Georgia Southern was being operated and run by the receivers in December, 1877.

The record shows that on the night of the 8th of December, 1877, the defendant in error, Bigelow, was put off the railroad cars about six miles from Rome, Georgia, on the southward bound train going towards Cave Spring, Floyd county, Georgia, between the hours of 9 o'clock and 11 at night, where there was no place for accommodating travellers nor temporary refuge from the inclemency of the weather.

For this ejection from the cars run on the railroad track of the Georgia Southern Railroad, Bigelow brought his action for damages against the Georgia Southern Railroad Company, the plaintiff in error, in Floyd superior court.

Under the evidence submitted and charge of the court, the jury returned a verdict in favor of the plaintiff below for the sum of seventeen hundred and fifty dollars damages, with costs. Whereupon defendant below made a motion for a new trial, on the following grounds:

- (1.) Because said verdict is contrary to law.
- (2.) Because said verdict is contrary to evidence and weight of evidence.
- (3.) Because the verdict is excessive, contrary to law and evidence, and there being no evidence to support the same.
- (4.) Because the court erred in not sustaining exceptions to the writ, and in holding the service made on Printup, as director of the Georgia Southern Railroad Company, and on A. S. Crane, as agent, was under the evidence insufficient to bind the defendant.
- (5.) Because the court overruled the demurrer to the declaration.
- (6.) Because the court erred in ruling out and not permitting Murphy, a witness, to answer the following question asked by defendant: "What time was this ticket out? On Saturday or Saturday night?"
- (7.) Because the court erred in refusing to give the following charge in its entirety as requested in writing:
- "A railroad company and its agents have the right to prescribe rules and regulations for selling tickets, and limit the time in which they shall be used. [And if the purchaser of such ticket is informed of such limitation he is bound thereby."] The part in brackets the court refused to give in charge to the jury as requested.
- (8.) Because the court erred in charging the jury that, by the ticket offered in evidence as having been issued to plaintiff below, the plaintiff had the right to return on the ticket at any time until 12 o'clock at night on the 8th of December.
- (9.) Because the court erred in giving to the jury that portion of his charge set forth in the ninth ground of the

motion as set forth in the record; also, that he erred in reading to the jury sections 3066, 3067, 3070, of the Code, there being no evidence to justify the verdict on said sections.

In the argument before this court counsel for plaintiff in error relied mainly upon three errors assigned in the motion:

- (1.) That there was no sufficient legal service on the defendant, the Georgia Southern Railroad.
- (2.) In the legal construction the court gave to the railroad ticket purchased by plaintiff below and on which he was proposing to return to Cave Spring.
- (3.) Because the verdict is excessive in amount under the evidence.
- 1. Was the service sufficient on W. S. Crane, as agent, and Printup, as director? The Code provides, "that service of all bills, subpœnas, writs, attachments, and other original process necessary to the commencement of any suit against any corporation in any court of law or equity, except as hereinafter provided, may be perfected by serving any officer or agent of such corporation, or by leaving the same at the place of transacting the usual business," etc. Code, §3369. It is contended that Crane was not the agent of the Georgia Southern Railroad Company, but of the Selma, Rome and Dalton Railroad Company, as shown by the evidence. But the evidence shows that the Georgia Southern was being operated by the receivers of the Selma, Rome and Dalton Railroad, a foreign corporation, using its own rolling stock to operate said road and dividing its earnings with said Georgia Southern, and necessarily the agents who aided in Georgia in operating said road within the limits of its territory were likewise agents of the Georgia Southern, at least to the extent of the interest said Georgia Southern had in the running of said line. If these local agents acted under the charter and franchises granted to the Georgia Southern Railroad, and that road re-

ceived, through those agents in connection with others, the profits arising from the operating said road in this state, or even a proportion thereof, that constituted them agents of said Georgia Southern in the sense that is contemplated in the 3369th section of the Code, and a service on such agent would be a sufficient service in law on said corporation, especially where it appears that Printup, the other party served, was a director, and the only resident director, of said Georgia Southern residing in this state. His service, in connection with the service on the agent, W. S. Crane, we deem all sufficient under the law. Code, \$3369; 17 Wall., 449; 12 Ill., 333; 49 N. Y., 148; 51 Miss., 525; 8 Metcalf, 252.

2. Was there error in the instruction given by the court to the jury that the railroad ticket owned by plaintiff below did not expire till 12 o'clock at night on the 8th of December? The evidence shows that about noon on the 6th of December, 1877, the plaintiff purchased what is known as a return ticket to go from Cave Spring to Rome and return. The ticket had on it these words: "Selma, Rome and Dalton Railroad. One seat. Rome and return, if used within two days from the date sold."

On the reverse side of the ticket was stamped, "Selma, Rome & Dalton R. R., December 6th, Cave Spring."

It appears from the evidence, that on the night of the 8th of December, before 10 o'clock, the plaintiff below entered on the car at Rome, of the defendant below, for the purpose of returning on this ticket to Cave Spring, at which place he had purchased the ticket; that on presenting the ticket the conductor refused to receive it, claiming the time limited to use it had expired, and against the will of plaintiff he was forced to leave the car, on his refusing to pay the usual fare. This ticket was issued and sold to plaintiff on the 6th of December; by it the plaintiff had the right to pass on the cars of the defendant below over the road from Cave Spring to Rome any time from the day of its purchase, and return if within two days

from the date sold. The date the ticket was sold was 6th December, and that date continued the 6th up to 12 o'clock that night, when a new date commenced, to-wit, the 7th of December; within two days, then, from 12 o'clock the night of the 6th, the plaintiff was entitled to return on the cars from Rome to Cave Spring, by the terms of this ticket. He boarded the cars on the night of the 8th, and was ejected before midnight, between 9 and 11 o'clock, according to the testimony. Under our view of this contract as evidenced by the ticket, the plaintiff was entitled to return on it till 12 o'clock the night of the 8th of December to Cave Spring, and we see no error in the instruction the court gave the jury on this subject. 2 Wall, 449; 2 Chitty on Con. (last edition), sect. 1064; 23 Mich., 1.

3. Was the verdict excessive in amount, under the proofs in the case? Courts are reluctant to interfere with the verdicts of juries in assessing damages for torts. The question for damages being one for the jury, the court should not interfere unless the damages are so small or so excessive as to justify the inference of gross mistake or undue bias. Code, §2947.

Whether the action of desendant below in ejecting plaintiff from its cars was a tort accompanied with aggravating circumstances, was a question for the jury, and exclusively within their province to decide, subject of course to the rule that they are not influenced by "gross mistake or undue bias." Here was this defendant in error, who had made a contract with the plaintiff in error to be transported on its train from Cave Spring to Rome and return within a time designated. Under that contract and by authority of it, for which he had paid his money, he was on the cars of the plaintiff in error; the night was cold, inclement and dark, and it had been raining and was then freezing. Without authority of law, and in violation of the legal terms of their own contract, the defendant in error, an old man 65 years of age, was put off the cars in freezing weather, between the hours of 9 and 11 o'clock

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at night, at no depot or stopping place, with no shelter or accommodation at which to remain, and his only chance was to follow the track of the railroad, on which he was painfully injured by falling through a trestle on the road. Taking all the circumstances together, we are not prepared to say that the damages were so excessive as to justify the inference of gross mistake or undue bias on the part of the jury. The defendant in error thus ejected was put in great peril both as to life and limb, and under' all the circumstances we think he should be properly compensated in damages, not only to satisfy his own wrongs and injuries, but to deter the wrongdoer from repeating the trespass. 49 Ga., 504; 54 lb., 224; 26 lb., 250; 10 Ib., 37; 27 Ib., 294; 3 So. Ca. Rep., 58; 36 Miss., 660; 32 Miss., I. Under our view of the law and facts of this case as the record discloses, we find no such error as would warrant us in reversing the judgment of the court below refusing a new trial.

Let the judgment of the court below be affirmed.

## LOWE, administratrix, vs. ALLEN.

- A court of equity, upon proper proof, will reform a deed and make it speak the truth, not only as between the parties, but against everybody else except bona fide purchasers without notice.
- (a.) A judgment creditor whose debt was made before the making of a deed to land, but whose judgment was obtained afterwards, did not stand on the basis of a bona fide purchaser without notice, so as to prevent the correction of a mistake in the deed as against him.
- (b.) Failure to record a deed, or its attestation by but one witness, does not postpone it to judgments junior to it.

Deeds. Judgments. Debtor and Creditor. Equity. Before Judge MERSHON. Crawford County. At Chambers. October 12th, 1881.

Reported in the decision.

Lowe, administratrix, vs. Allen.

R. D. SMITH, by N. J HAMMOND; L. D. MOORE, for plaintiff in error.

M. D. STROUD; DUNCAN & MILLER, for defendant.

SPEER, Justice.

This was a bill filed by the defendant in error, for relief, injunction, etc., against the plaintiff in error and others, 'alleging, in substance, that one Harrison became indebted to complainant, and also was indebted to the intestate of plaintiff in error. To secure the debt due to complainant, Allen, he undertook to secure him by giving him a deed defeasible, under the 1960th section of the Code, to a lot of land he owned, and still owns, in Crawford county. By mistake the land was described in the deed as lot number ninety, when it should have been ninety-nine. This deed was attested by a single witness, he being a justice of the peace. Mrs. Harrison, the wife, consented to the execution of the deed, as required by the statute. This deed was made and delivered after Harrison had contracted his debt with Lowe, the intestate, and was made in good faith to secure Allen, the complainant. After the execution of the deed, Lowe, the administratrix, sued her debt to judgment and levied on the land and advertised it for sale. Allen then filed this his bill to enjoin the sale and reform his deed, by having the land described by the true number of the lot, in order that his rights as the holder of the deed might be protected. The chancellor on the hearing refused to dismiss the bill on demurrer, and granted the injunction, requiring complainant to give a bond in the sum of five hundred dollars to save defendant harmless. To the order granting the injunction and overruling the demurrer, defendant below excepted and assigns the same as error.

The deed is a good deed between the parties to it, though attested by but one witness. See Code, §2690, as construed by 17 Ga., 295; 51 Ib., 268. The deed

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being made under section 1969 of the Code, as to third parties, no record is required, and even if not recorded it would only be postponed to younger deeds, not to judgments. Code, §§ 1969, 2705, 2706; 60 Ga., 588; 62 Ib., 623-7. In the last case cited this court ruled: "The delay to record a deed has no relevancy, except upon the question of fraud. The consequence of not recording a deed within a year from its date is not to defeat the conveyance as against judgment creditors, but as against subsequent vendees from the maker of the deed, if they purchase without notice." 62 Ga., 627 (3).

Neither could the plaintiff in error claim to be damaged by the non-recording of the deed, since the debt due by Harrison to her intestate was incurred before the execution of the deed from Harrison to Allen, and for the same reason its defective execution, or the purpose to reform it, would not damage her, since no credit could have been extended by her intestate to Harrison on the faith of this land after the execution of the deed and by reason of the failure to put it upon record. 49 Ga., 124 (3).

A court of equity, upon proper proofs, can and will reform a deed and make it speak the truth, what the parties really intended, not only as between the parties but against everybody else but *bona fide* purchasers without notice, and a judgment creditor is not such a purchaser. Code, §§3114, 3123, 3119; 7 Ga., 383; 13 Ib., 88; 62 Ib., 413; 40 Ib., 535.

We think, under the allegations of this bill and proofs submitted, there was no error in the chancellor's granting this injunction—fully protecting, as he did, the rights of the plaintiff in error by the bond required. If the plaintiff in error does not wish to await a trial upon the injunction, by paying the amount shown to be due by Harrison to the defendant in error, she can redeem the land conveyed as security, and then proceed with her fi. fa.

Let the judgment be affirmed.

# THE AUGUSTA AND SUMMERVILLE RAILROAD COMPANY vs. DORSEY.

- 1. A suit against a railroad company for damages resulting from the careless and negligent running of its engine may be amended by setting out negligence in not discovering and remedying defects in the machinery of the engine, which by the use of ordinary care and diligence could have been discovered and remedied so as to prevent the accident. Such amendment does not add a new cause of action.
- 2. That since the commencement of the pending suit the same plaintiff has brought suit for the same cause of action against another defendant, is not good ground for a plea in abatement nor for compelling the plaintiff to elect which action he will pursue.
- 3. The plaintiff being an expert engineer, and one question being whether he had been negligent at the time of the accident which was the basis of the suit, it was competent to prove by him what were his duties.
- He could also testify to the fact that he had complied with all the instructions given him.
- 5, 6. A model or drawing may be made by a party to a suit to illustrate any article of machinery involved in the issue on trial, without notice to the opposite party. Whether such model or drawing is properly proved to be such, is another question, and one not made here.
- 7. One question in a case being whether an engineer could be stopped under certain circumstances, an expert who testified on that subject could give his reasons for what he stated, and for that purpose, by way of illustration, state what he had known to be done under even more difficult circumstances.
- 8. The question being as to the duties and diligence of a particular employé, testimony that employés are generally required to work with dispatch is not admissible.
- A conductor in authority over an engineer may testify as to the duties of the latter.
- 10. If specific instructions are given to an employe, they will control him; but if none are given, he will be governed by the general duties of his position. Where the testimony as to the existence of specific instructions was conflicting, the general duties of the position could be proved, as bearing on the case in the event the jury believed no specific instructions existed.
- 11. Where the opinion of an expert is admissible without giving any

reason, the opinion of one not an expert is admissible with his reasons therefor.

- (a.) The existence of negligence being a vital issue in a case, the exclusion of competent testimony in respect thereto is a substantial error, and not a mere technical one.
- 12. In a suit by an employé of a railroad against his master for damages alleged to have resulted from the negligence of a co-employé, the latter is competent to prove that he was not at fault, under proper questions for that purpose.
- Facts cannot be proved by a witness who states them from hearsay.
- 14. After amending his action, it is immaterial to prove why the plaintiff did not originally set out his cause of action in the shape put upon it by the amendment.
- (a.) If this could be done, his statements to his counsel are not admissible for that purpose, he being himself a competent witness.
- 15. After all the testimony has been closed, to reopen it for further direct testimony is a matter resting in the sound discretion of the court, and unless abused, it will not be controlled.
- 16. The requests to charge in this case were substantially covered by the charge as given.
- 17. In a case involving vindictive damages this court would set aside a verdict if it had reason to suspect that such verdict was the result of bias in favor of one class of suitors or prejudice against another class.
- 18. Persuasive oratory is among the legitimate weapons of the lawyer, and that juries are affected by it is no ground for granting a new trial.

Amendments. Abatement. Actions. Evidence. Witness. Damages. Negligence. Practice in Superior Court. Charge of Court. Verdict. Attorney and Client. Before Judge SNEAD. Richmond Superior Court. October Term, 1880.

Reported in the decision.

FRANK H. MILLER; J. GANAHL, for plaintiff in error.

F. T. LOCKHART; W. K. MILLER; J. C. C. BLACK, for defendant.

CRAWFORD, Justice.

George R. Dorsey sued the Augusta & Summerville Railroad Company, claiming \$15,000.00 damages for injuries sustained, as he alleged, by reason of the unskillful, careless and negligent running of the engine and cars, in that by the said carelessness and negligence he was run over and his left leg so mashed and mangled that its amputation was necessary. That, as a consequence thereof, he suffered great bodily pain, and was put to large and heavy expenditures.

The defendant pleaded the general issue and a special plea, setting forth that plaintiff had been employed by the company on account of his experience as an engineer to act as flagman, and to take charge of the engine engaged in transferring passengers and freight through the city of Augusta, and to and from the several depots thereof. That at the time he was injured he had the sole and entire management of an engine rented by the company from the Georgia Railroad Company and manned by their employés. That when he was injured he was on the pilot of the engine, by his own voluntary act, and while the engine and cars were in motion he uncoupled the engine from the cars, when by reason of the separation he was unable to retain his position, and fell in front of the engine and was run over. That there was no pressing emergency requiring the act to be so performed, and that his action was one that no reasonable man would have done.

During the pendency of a former trial in the case, plaintiff filed an amendment to his declaration which the court allowed, and to the filing of which the defendant filed exceptions pendente lite.

This amendment was as follows:

"That besides the unskillful, careless and negligent running of said engine and cars, the said defendant is further guilty of negligence in this, that the drag-bar on the pilot of the engine then and there being used, upon which your

petitioner was standing, in the due and proper discharge of his duty, and without fault upon his part, was defective, which defect was not known to your petitioner at the time of the injury aforesaid, and not discoverable by him in the reasonable and ordinary exercise of diligence in the course of his duty, and that said defendant was careless and negligent in not discovering said defect, as it was its duty to do, or in failing to remedy the same."

The interlocutory exceptions filed thereto, and allowed, were as follows:

"Because the court allowed the plaintiff to amend his declaration setting out defective machinery as the cause of the accident, defendant's attorney objecting to the amendment as setting out a new and independent cause of action, and as not setting out the exact defect of the machinery which caused the injury, nor any knowledge of such defect."

When the declaration was amended, defendant amended its plea as follows:

"That the engine and engineer were employés of the Georgia Railroad and Banking Company, and hired by this defendant from said road to do this work for them, which plaintiff was employed to direct and control. That plaintiff knew this from the time of his employment, September 22d, to his injury, October 13th, 1877, daily and continuously used the same engine and the same employés, which were under his sole control.

"That if any of the machinery was defective and thereby caused plaintiff's injury, which defendants deny, it was sudden and without the previous knowledge of said employés of the Georgia Railroad and Banking Company, or of this defendant, and happened after previous use the same day by plaintiff without objection on his part."

Upon the last trial, defendant filed another plea as follows:

"That since the commencement of this suit and the amendment made to plaintiff's declaration, made May

6th, 1879, to which interlocutory exceptions were filed July 1st, 1879, by this defendant, the plaintiff instituted, September 9th, 1879, his action against the Georgia Railroad and Banking Company for damages, setting forth the same cause of action which is set forth in said amendment of May 6th, 1879, the declaration in which case, as of file in this court, is here to the court shown, which it prays may be inspected by this court, and if found to be the same cause of action, that plaintiff be required to elect which corporation he will hold responsible, and dismiss his cause of action as to the other for the same injury before this case shall proceed further."

This, on demurrer, was stricken, when defendant amended its plea, as follows:

"That by ordinance of the city council of Augusta, confirmed by the act of the legislature, they are authorized to use locomotive power for the movement of passenger, baggage and freight cars on their tracks. That having no engines of their own, they entered into a contract with the Georgia Railroad and Banking Company, which, along with other things, agreed to furnish to these defendants, for local work other than through transportation, an engine free of charge, in return for which these defendants were to do, on their own track, all the local hauling of said railroad free of charge.

"That pursuant to this contract, the engine set forth in plaintiff's declaration was furnished to this defendant for local work, from day to day, and was, by the plaintiff, as the sole agent of this defendant in that behalf, and employed for the purpose of personally controlling the movements thereof, accepted from day to day from the said Georgia Railroad and Banking Company, to-wit: from the date of his employment, September 22d, 1877, until his injury, October 13th, 1877. That on the day of the injury the plaintiff failed, as the agent of this defendant, to inspect the condition of the engine, but received and took the control and direction of the same, and that it

was when thus under his direction and entire control that he, while riding on the pilot thereof, of his own free volition, undertook to uncouple, when no pressing emergency existed, the engine from the car in front of it, which it was pushing forward, the train being still in motion at the time of the accident. That this act, defendant avers, was done at the personal risk of the complainant himself, and contrary to instructions. That if any negligence was committed, the plaintiff contributed thereto, and that if anything was omitted which should have been done, it was by the plaintiff himself."

Upon the declaration and pleas as herein set forth, the parties went to trial, and, under the evidence and charge of the court, the jury returned a verdict for the plaintiff for \$11,000.00. The defendant moved for a new trial, upon the grounds set out in the record, which was overruled by the court on each and every ground therefor, and the defendant excepted.

- I. The first ground was the allowing plaintiff to amend his declaration as herein set forth. The plaintiff's suit was based on the unskillful, careless and negligent running of the engine and cars; and the amendment was likewise founded on the alleged carelessness and negligence of the defendant. in not discovering that the drag-bar on the pilot of the engine was defective, and which, by the exercise of ordinary care and diligence, it could have discovered. The amendment was no new cause of action, and was properly allowed.
- 2. The second ground is because the court, on demurrer, struck the amended plea of the defendant, asking an abatement as to said defendant, and praying an election between the pending suit and the one against the Georgia Railroad Company.

Where there are two suits pending by the same plaintiff against the same defendant, upon the same cause of action, commenced at the same time, the defendant may require the plaintiff to elect which one he will prosecute.

But if not commenced simultaneously, then the defendant may plead the former in defence of the latter. Code, §2894. This case did not present the facts for the application of this principle.

3. Because the court allowed the plaintiff to testify as to what was the duty of the engineer. The plaintiff himself having been admitted by the defendant to be a competent engineer, and one of the very questions in the case being whether the engineer was in fault on the occasion of the injury, it was not illegal for the plaintiff to testify as to his duty, that it might be also shown whether or not he was faithfully discharging that duty. The testimony was properly admitted.

4. Because the court permitted the plaintiff to testify that he had complied with all the instructions given him.

One of the issues of fact in the case was, whether he had obeyed the instructions which had been given him; and, of course, being a witness, he should have been allowed to state how that was. It was competent for the defendant to put it in issue, and to introduce testimony to the contrary, and why not equally so for the plaintiff?

5, 6. Because the court admitted in evidence, over the objection of defendant's attorney, a wooden model of a pilot and drag-bar, claimed to be that of the "Southerner." which caused the injury, without showing that the same from which it was copied was the identical pilot, or that any notice of the making thereof was given to defendants. Because the court admitted in evidence, over the objection of defendant's attorney, as ex parte and without notice, the drawing made by E. W. Brown, of the pilot of other engines than that which caused the injury to plaintiff.

The objection to the admissibility of this model, as appears by the record, was, that it was ex parte, and that there was no notice given of the intention to take a model of the pilot and drag-bar, and not because it was not shown

to be a model of the "Southerner." A model may be taken by a party to a suit, to illustrate any article of machinery involved in the issue on trial, without notice to the opposite party.

7. Because the court permitted the witness, H. L. Gibson, over the objection of defendant's attorney, to detail an instance of his personal experience on the Macon and Augusta Railroad, when in charge of an engine drawing a train of seven cars after it.

The conduct of the engineer in charge at the time of the injury being under inquiry, and the question being whether he might or might not have stopped his engine in time to prevent the damage to the plaintiff, this witness was allowed to give his testimony on that subject, and by way of illustrating what could be done as to stopping an engine, stated as an engineer, what he knew could be done, by his having done it, not with an engine simply, but with an engine and train of cars. This certainly went to illustrate the issue not upon theory alone, but upon actual knowledge, and was therefore admissible.

8. Because the court permitted H. L. Gibson, a witness for plaintiff, and engineer on the Georgia Railroad, to testify over objection of defendant's attorney when asked, "Do you know whether all employés are required to do their; work with dispatch"—and to answer, "that is the rule they generally work upon."

The rule upon which employés generally work, was not a matter involved in this investigation touching the special work of this employé, and was therefore inadmissible, as I think.

9. Because the court permitted the witness, J. H. Davis, to testify—he being a conductor—to the duties of an engineer as to looking forward.

This objection appears to be founded upon the fact that the witness was a conductor. We are unable to appreciate the ground of the objection. Certainly one who is in au-

thority over an engineer whose duty is to obey, would be competent to testify as to what those duties were.

10. Because the court permitted the witness, W. E. Touchstone, to testify as to what his duties and instructions were as a flagman previous to Dorsey's appointment, and particularly that it was no part of his duty to inspect the engine received from the Georgia Railroad.

One of the grounds upon which the plaintiff based his right to recover in this case was, that the machinery with which he was to do his work was defective. It was undoubtedly the duty of some of the agents or employés to look after this matter. The parties were at issue as to whether there were any specific instructions given to the plaintiff; if there were, then he was bound by them; if none, then the general duties appertaining to the position were all important. For if it were the duty of the plaintiff to inspect the machinery for the company as its agent or employé, and he failed to do it, then he was not without fault, and therefore would be entitled to no recovery.

If the theory of the plaintiff was true that he had no special instructions, and under the general duties of the place this inspection did not devolve upon him, then the testimony was important and in that view admissible. Otherwise it would not be.

11. Because the court, after Jesse Thompson, a witness for defendant, had stated the facts of the accident as witnessed by himself, refused on motion of defendant's counsel to permit the witness to swear to his opinion and belief whether or not what he saw plaintiff do was the act of a prudent man in taking ordinary care of himself, and to give his reasons for his opinion; the question before the jury for their consideration being whether or not plaintiff was blameless in uncoupling the flat-car from the engine while standing on the pilot and the train was in motion, the said Jesse Thompson being the only witness to the accident not connected with the running of the

train; this testimony being offered after the testimony introduced by plaintiff, of persons claiming to be experts, who had expressed their opinion about riding on the pilot and uncoupling in that position, this testimony being specially claimed to be admissible, under section 3867 of the Code.

The law is that experts may give their opinions upon the matter under investigation, where such opinions are admissible, without giving any reason for their opinions; others than experts may swear to their opinions or belief, giving their reasons therefor. The testimony of this witness was ruled out because he was not an expert. Upon any question upon which an expert is allowed to give his opinion without a reason, one who is not an expert may give his with his reasons. If, therefore, the testimony of those who claimed to be experts on the matter in controversy was admissible, then, as a necessary consequence, the testimony of this witness was. The admission of one was the admission of both, the exclusion of one was the exclusion of the other. Both or neither was the law.

But it is said that this was only a technical error, and not such a one as to justify the grant of a new trial, and in support of this view, the case of Howell vs. Howell, 59 Ga., 145, is relied upon. We recognize and reaffirm the rule there laid down, but in our judgment this is a very different case from that. This was the only wholly disinterested witness to the accident; the vital question being, was the plaintiff without fault in stepping off from the platform car, where he was perfectly safe, over upon the open bars of the pilot, and that too while the engine was in motion, and where the miscalculation of an inch in placing his foot on, instead of between, the bars of the pilot, was to be passed upon by the jury. And after the plaintiff and certain of his witnesses had expressed their opinions, that it was perfectly safe to uncouple from the pilot, the train being in motion, it was certainly but even-handed justice to have allowed this witness to have given his

opinon with his reasons therefor that it was not. Standing originally on the pilot and uncoupling from there, and moving from the flat-car to the pilot to uncouple whilst in motion, seem to us very important elements entering into the question of whether or not this plaintiff was faultless in this affair.

We are unable to say how far the opinion of such a witness as this, who had had an observation of seven years as to the way in which this work had been done, would have affected the verdict of the jury. And if we were, it would be improper to state it. But most assuredly the defendant should have had the benefit of its effect and weight with the jury, whatever that might have been.

- 12. Because the court refused to permit the witness, J. W. Touchstone, to answer the question, "Were you at fault at all?" In view of the fact that the plaintiff had put the blame or fault on this witness by his testimony, it was nothing but proper to have allowed him to rebut fully the whole testimony of the plaintiff, so that the jury could have passed upon the truth of the issue between them on this most material point. We do not mean to be understood to be ruling upon the form of the question, so much as upon the limitation put upon the testimony itself.
- 13 Because the witness. Ellis, when sworn, was permitted to answer, that Mr. Davis, the president of the company, had a rule which disallowed the employés to come into his office with their coats off, as he had been told by Mr. Mosher. This testimony, so far as relates to what Mr. Mosher told the witness, was ruled out, which was correct. But the whole of it should have been ruled out, because founded entirely upon what Mosher said, and upon nothing said or done by Mr. Davis; and even if it had been, it was wholly irrelevant.
- 14. Because Lockhart, one of the attorneys for the plaintiff, was allowed to testify as to conversations with Dorsey as to why the defective machinery of the engine was not originally alleged as a cause of action. Mr. Dor-

sey being a competent witness, his sayings as to the machinery were inadmissible, and especially so after the amendment had been allowed, as his reasons for the omission were then immaterial.

- 15. Because the witness, Radcliff, was confined to rebuttal alone in his testimony, he having been offered after all the parol testimony had closed. After all the testimony has closed, to re-open the case again for other and further direct testimony, must always rest in the sound discretion of the judge, and unless abused will not be interfered with by this court. 14 Ga., 242; 64 Ib., 344; See also Maddox vs. The State, ruled at the present term.
- 16. The 16th, 17th, 18th, 19th grounds of the motion for a new trial were based upon requests to charge, which were refused, and charges given upon request, and for errors and omissions in the charge itself. A close and critical examination of the charge as set out in full in the record, satisfies us that the judge understood thoroughly the law of the case, and gave it in a clear, concise, and satisfactory manner to the jury. So that when this is done, we cannot see how a failure to repeat what may be good law, but has been substantially charged, should be any good ground of error. As there are no two cases exactly alike in their facts, extracts from elementary books and judicial decisions, although good, sound law, need not be reiterated to the jury after having been once stated in substance in the general charge. The experience of each member of this bench is, that they often tend to confuse and bewilder, rather than enlighten and instruct the jury. The principle of law covering each fact in the case is quite as much as need be given; and when that has been done, elaboration often perils the principle itself, and had best be omitted.
- 17. The 20th, 21st, 22d are founded upon the verdict, in that it is against the evidence, the weight of evidence, was excessive and unsupported by the facts of the case. Whilst this court will never invade the province of the

jury in weighing testimony, yet it would not hesitate to set aside a verdict in a case involving vindictive damages, where there was reason to suspect that the same was the result of bias in favor of one class of suitors, or prejudice against another class.

18. The last ground of error complained of is an extract from the closing argument of Mr. Black to the jury, in which, with great eloquence and power, he described the agony, the suffering and the torture endured by the plaintiff; and for which, as well as for every sigh, every groan, and every pain that he had suffered, he should have compensation equivalent to his agony. These were to be put in one side of the scales, and in the other side money, money, until they "in even balance hung," and the jurors felt that he had been fully and adequately remunerated.

The complaint is, not that this appeal was illegal, but that its effect was electrical, and produced a verdiet founded not upon law and fact, but upon sympathy and sorrow. We cannot recognize this as a good ground for a a new trial. Impassioned appeal, and persuasive eloquence are but the lawful weapons of forensic conflict, and undoubtedly have been employed from the time in Greece when Mars himself was tried for murder by a jury of twelve men and acquitted by an equality of votes, in the first trial mentioned in history by a jury of that number. 3d Modern Rep., preface, page 9. On the whole, therefore, we think that there should be a new trial in this case.

Judgment reversed.

# Moses, trustee, vs. The Eagle and Phenix Manufacturing Company.

### [Crawford, Justice, did not preside in this case.]

- Where distinct parcels of property are levied on under one levy, and and all claimed by the same claimant, the whole tried under one issue, and a verdict rendered finding certain particular parcels of the property subject, the legal intendment of such a verdict would be that the balance was not subject.
- (a.) While it might have been more regular to have required the jury to have found explicitly as to all the lots before receiving the verdict, yet where the verdict has been returned and a judgment rendered ordering the f. fa. to proceed against the parcels found subject, the judgment could subsequently be amended by declaring the true intendment of the verdict and adjudging accordingly.
- (b.) That a judgment has been before the supreme court for review, and has been affirmed, will not prevent a subsequent amendment so as to more certainly declare the effect of the verdict.

Judgments. Amendments. Verdict. Claims. Practice in Superior Court. Before Judge WILLIS. Muscogee Superior Court. November Adjourned Term, 1880.

Reported in the decision.

R. J. Moses, for plaintiff in error.

PEABODY & BRANNON, for defendant.

SPEER, Justice.

An execution in favor of Van Leonard, trustee, against the Water Lot Company, of the city of Columbus, issued on the 18th of September, 1867, from the superior court of Muscogee county, was levied upon certain property known as water lots numbers 4, 5, 9, 6, 7, 8, 10, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, all lying and being in the city of Columbus,

each lot containing 72 feet front north and south on Bay street, and being between Franklin and Crawford streets, also the dam across the Chattahoochee river nearly opposite lot I aforesaid survey, and the canal and raceway in front of said lots, and all the water power and right to control the water in front of the city of Columbus, subject to the rights of the owners of lots I, 3, II, I3 and I5, each to one-nineteenth part of the water controlled. Dam and canal under divers deeds from the Water Lot Company, etc., Levy made 5th of March, 1877. To this the Eagle & Phenix Manufacturing Company interposed their claim to the property levied on, and on their giving bond the same was returned to the court for trial, on issue joined on said levy and claim, a trial was had and the jury returned the following verdict:

"We, the jury, find the water lots numbers 20 to 37 inclusive subject to plaintiff's execution." [Signed] A. A. BOYD, Foreman.

Whereupon the following judgment was entered on said verdict:

"The jury in this claim case having found lots 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, levied on by plaintiff to be subject to plaintiff's execution, and the claimant having interposed a claim to all of said lots known as water lots 20 to 37 levied on, except lots 23, 24, 25, it is considered and adjudged that plaintiff's fi. fa. proceed for the use of J. J. Bradford, trustee, against the aforesaid water lots from 20 to 37, including 20 and 37, and he recover from claimant his costs in this proceeding.

June 4, 1877.

R. J. Moses, Blandford & Garrard, Attorneys for plaintiff in fi. fa."

It further appears that, on notice to R. J. Moses, trus tee, on motion of attorneys for claimant, at the November adjourned term, 1880, of Muscogee superior court, the court entered the following judgment nunc pro tunc in said cause:

"Van Leonard, trustee Howard Manufacturing Company, plaintiff in f., fa.,

US.

The Water Lot Company of the city of Columbus, defendant, and the Eagle and Phenix Manufacturing Company, claimant.

Fi. fa. levy and claim in Muscogee superior court.

"It appearing to the court that the above stated fi. fa. was levied by the sheriff of this county, on the 5th of March, 1877, upon the following lots known as water lots: Numbers 4, 5, 6, 7, 8, 9, 10, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, all lying and being in the city of Columbus, each lot containing 72 feet front, north and south, on Bay street, between Franklin and Crawford streets, according to a survey made by John Bethune, on the 6th of December, 1841, also the dam across the Chattahoochee river, nearly opposite lot I of said survey, and the canal, or race-way, in front of said lots, and all the water power and right to control the water in front of the city of Columbus, and state of Georgia, as fully as the same is owned or controlled by the Water Lot company of the city of Columbus, subject to the rights of the owners of lots 1, 3, 11, 13 and 15, each to one-nineteenth part of the water controlled by said dam and canal, under divers deeds from the Water Lot Company of the city of Columbus, the whole levied on as the property of said defendants in fi. fa.; and the said claimant having filed his claim to lots 4, 5, 6, 7, 8, 10, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, also the dam across the Chattahoochee river and the canal, or race-way, in front of said lots, and all the water power in front of said lots, or belonging or appertaining thereto, in front of the city of Columbus, which had been so levied on. And at the May term, 1877. an issue was joined between the plaintiff in fi. fa. and claimant as to the said property so claimed being subject to said fi. fa., and upon said issue a jury came, and after hearing evidence, returned the following verdict, to-wit: "We, the jury, find the water lots numbers 20 to 37, inclusive, subject to the plaintiff's execution," upon which verdict the said plaintiff, at the said term of said court, entered up the foltowing judgment, to-wit: "The jury in the claim case having found lots 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, levied on by plaintiff's ft. fa., to be subject to plaintiff's execution, and the claimant having interposed a claim to all of said water lots known as water lots 20 to 37 inclusive, levied on, except lots 23, 24, 25, it is considered and adjudged that plaintiff's ft. fa. proceed for the use of J. J. Bradford, trustee, against the aforesaid water lots, from 20 to 37, including 20 and 37, and that he recover from claimants his costs in this proceeding."

And whereas the true meaning and effect of said verdict was, that all the property so levied upon and claimed as aforesaid, except lots numbers 20 to 37, inclusive, except lots 23, 24 and 25, were, by the said jury, found not subject to said fi. fa., and no other judgment having been rendered or entered up on said verdict except the before recited judgment; now, upon motion of claimant, it is considered and adjudged by the court that all of said property so levied upon and claimed, except lots 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, lot number 9 not having been claimed, is not subject to plaintiff's fi. fa., and that the said levy be dismissed as to all the remainder of said property so levied on and claimed as aforesaid. This judgment to be entered up as of said May term, 1877.

[Signed] J. T. WILLIS, J. S. C. C. C."

To the allowing and entering said judgment on the minutes upon said verdict nunc pro tunc plaintiff in fi. fa. excepted, and assigned the same as error.

The real question lying at the foundation of this case is, whether the judgment nunc pro tune, rendered by the court below and excepted to, is in harmony with and by legal intendment can be sustained by the verdict made by the jury. If averdict is found, and a defective or insufficient judgment entered thereon, no one can question the right of the court to aid it by amendment. The Code declares: "A judgment may be amended, by order of the court, in conformity with the verdict upon which it is predicated, even after an execution issues." Code, §3404. The only question then is, did the court below, in conformity with the verdict returned, amend this judgment. We recognize the rule insisted upon by counsel for plaintiff in error, that the court could not amend a verdict after the jury had been discharged from the case, as was held in 8 Ga., 20; 17 Ib., 362; and other authorities cited; but that is not the question here. If it became necessary to amend this verdict in order to sustain the judgment complained of, we admit the position of plaintiff in error would be right. But the defendant in error sought no such interference, but to let the verdict stand as returned and amend the judgment rendered, so as to let the judgment

speak the legal intendment of the verdict that was made. Verdicts are to have a reasonable intendment, and are to receive a reasonable construction, and are not to be avoided unless from necessity. Code, §3561. When the issue presented to the jury by the plaintiff in fi. fa. was that water lots numbered from 4 to 37 inclusive (except lot 9), dam and race-way, were subject to his fi. fa., and claimants said they were not subject, and upon that issue the jury returned a verdict finding lots from 20 to 37, inclusive, subject, is it not a reasonable construction of that verdict that the balance of the property levied on was intended to be found not subject?

We admit it would have been more regular for the court, on motion, to have declined to receive the verdict. and had the jury expressly to find the other property levied on not subject, but the plaintiff accepted the verdict as rendered and entered judgment thereon, and then by bill of exceptions complained before this court of certain rulings of the court, which alone could have been brought here on the theory that he had failed to recover the other property levied on. This seems to have been the construction given to this verdict by the action of the plaintiff below at the time it was rendered. Mark it, the plaintiff did not by motion for new trial in that case seek to set aside the whole verdict, but only excepted to the rulings of the court by which he complained he failed to recover the balance of the property not mentioned expressly in the verdict, and we think his construction of the verdict was then right, and neither upon argument nor authority have we been convinced here that he was not And this construction is aided in the very judgment this court rendered on the plaintiff's bill of exceptions in that case. For in speaking of the verdict and its legal intendment, this court (Judge Bleckley pronouncing the opinion) says: "The verdict of the jury was silent as to some of the numbers, and in the plaintiff's favor as to the rest. Possibly a correct construction of such

a verdict would be that so much of the issue as was not found for the plaintiff was by implication found against him. That such was the intention of the jury is in a high degree probable." We are aware that this is mere obiter, but we are the more strengthened in our conviction of the correctness of this judgment now complained of, that the construction we now give to this verdict is concurred in by the judge who delivered then the judgment in that case, and whose judicial opinions have commanded the respect and confidence of the court and of the profession at large.

The interposition of a claim to property levied on is an anomaly in our jurisprudence. It is the creation of our statute, and unknown to the common law. taken the place in a great measure of the action of trespass at the instance of the true owner against the officer who levied upon property not subject to be levied on It is really, by analogy, a suit by the plaintiff in fi. fa. to recover property out of the claimant, to have the same sold to satisfy his lien. In such a suit, if a recovery was had of only a part of the property sued for. could it be maintained that on such a verdict its legal construction would not be that he had failed to recover the balance? Suppose, to illustrate further, the plaintiff sues to recover on two promissory notes set out in the same declaration, and both being in evidence, and under proper pleas filed, a recovery was only had for the amount due on one of them, would it not be a legal conclusion that the verdict was for the defendant as to the other? Our conclusion, therefore, is, that where distinct parcels of property are levied on by the same levy, and they are all claimed by a claimant and tried as a whole, under the same issue, and a verdict returned by the jury finding certain particular parcels of that property subject, that the legal intendment of such a verdict would be that the balance the plaintiff has failed to subject, and the claimant would be entitled to his judgment to have the same

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so declared. Our duty under the law is to give a reasonable construction to verdicts and not to avoid them except from necessity.

But it is said this judgment now sought to be amended has been on a writ of error affirmed by this court, and hence it cannot be amended below, as it is made final and conclusive by the judgment rendered here. Non constat. It still stands unaffected, unchanged, and this judgment of amendment only is to declare with more certainty the effect of a verdict which now for the first time is here for adjudication.

Let the judgment of the court be affirmed.

### HARVEY vs. HEAD.

[Speer, Justice, being disqualified in this case, Judge Uuderwood, of the Rome cheuit, was appointed to preside in his stead.]

- A verdict which is not explicit in its terms, but the intention of which
  is apparent from the pleadings and evidence, may be construed with
  reference thereto by the court.
- (a.) The issue formed by an affidavit of illegality, on the ground (among others) that there was no verdict on which to base the judgment rendered, having been submitted to the court without a jury, the record of the case in which the judgment was rendered, including the material portion of the brief of evidence used on a motion for new trial therein, was admissible to show whence the court derived the construction put upon the verdict by him.
- 2. A security on a claim bond is sufficiently a party to the claim case to be bound by the verdict and judgment therein for damages and costs. If the judgment is brought to the supreme court and affirmed, he cannot afterwards go behind it by affidavit of illegality.

Verdict. Judgment. Parties. Claim. Evidence. Res Adjudicata. Principal and Surety. Before Judge LAWSON. Monroe Superior Court. August Term, 1880.

Reported in the decision.

Harvey vs. Head.

STONE & TURNER; T. B. CABANISS; JNO. D. STEW-ART; JNO. I. HALL, for plaintiff in error.

A. D. HAMMOND, for defendant.

UNDERWOOD, Judge.

R. T. Harvey sued out an attachment against C. C. Wilson, and caused the same to be levied on a tract of land in Monroe county, containing 180 acres, and one-half interest in a house and lot in the town of Forsyth. Judgment was obtained at the September term, 1876, of Monroe superior court, for the sum of three thousand eight hundred and eighty-five dollars and fifteen cents, principal and interest four thousand six hundred and forty-five dollars and seventy-five cents, and costs, against the property levied on. Execution issued and was levied on the property attached, which was claimed by Josiah Freeman, trustee for Mrs. Sarah A. Freeman, who gave W. H. Head as security on the damage and cost bond. The claim case was tried at August term, 1878, of Monroe superior court, and the following verdict was rendered: "We, the jury, find the property subject, and twenty-six per cent damages." At the same term of the court judgment was signed up by plaintiff's attorneys against the claimant and W. H. Head security, for the cost, and two hundred and sixty dollars damages, being twenty-six per cent on one thousand dollars, the judgment stating the value of the property, one thousand dollars. The judgment thus signed was approved by his honor, Judge Grice, who tried the claim case. The judgment declared the property subject to the execution, and that the value of the property levied on was one thousand dollars (the sum due on the judgment was more than eight thousand dollars), and in terms adjudged in favor of plaintiff in fi. fa., two hundred and sixty dollars against claimant and W. H. Head, security, as damages. Execution was duly issued on this judgment against claimant and Head, the security for the amount, and levied on the

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property of Head, the security. Head filed an affidavit of illegality to the judgment and execution. There are many grounds of illegality which need not be stated, as the decision of the judge, who was selected by the parties to hear both law and facts, set out the ground held to be good, and overruled all other grounds as follows: "So much of the illegality as sets up that the judgment rendered at the August term, 1878, and the execution issued thereon are void, on the ground that there was no verdict to authorize such judgment and execution, is sustained, and the remaining grounds of the illegality are overruled."

This last mentioned decision was made September 4th. 1880. The judgment signed on the verdict in the claim case, and approved by Judge Grice, was at August term. The claim case of Harvey vs. Freeman, trustee, was carried by bill of exceptions to the supreme court, and there dismissed, affirming the judgment of the court below. Upon the trial of the illegality before Judge Lawson, in September, 1880, the plaintiff in fi. fa., in order to show that the construction of the verdict rendered as aforesaid was involved in the case that went to the supreme court, and that objections to the verdict could then be made, offered in evidence the bill of exceptions which was filed to the judgment of the court in the claim case, and which was dismissed, as before stated, affirming the judgment of the court in 1878. The evidence thus offered was rejected by the court, which was error.

The plaintiff in fi. fa. offered in evidence the record of the evidence in the claim case, which resulted in the verdict, to-wit, the testimony of Ham, that the half-interest in the house and lot in Forsyth was worth from five to six hundred dollars, and the testimony of R. T. Harvey that "the land in the country levied on is worth from five to six hundred dollars." This evidence was also rejected. The court made the decision on the merits as stated, and plaintiff in error excepted to all this.

The rule, we think, is this: A verdict may be amended

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by the court or construed by reference to the pleadings and the evidence in the record, and in some instances from the notes of the judge. We regard the judgment signed and approved by the judge at August term, 1878, as an amendment of the verdict, or at all events as a construction of the verdict. This was done at the same term of the court that the verdict was rendered. When the illegality case was on trial, counsel for plaintiff in f. fa. offered in evidence the evidence in the record, the bill of exceptions, to show that the verdict which had been construed by the court was involved in that case, and the judgment and verdict with its construction by Judge Grice affirmed. It is contended that Head, the present defendant in error, was no party to that case. Why not? The pleadings in the case were the fi. fa., the levy, the claim affidavit, and the bond for damages and costs, signed by Head as security, the issue formed by the claim, and the issue thereon. As to the question of damages, the statute of the state authorizing the jury to give damages in case it should appear to be made for delay only, supplied the place of pleadings.

The issues for the jury to pass on were two: Was the property subject or not subject to the fi. fa.? And if subject, was the claim interposed for delay only? Both issues were passed upon by the jury.

The evidence of Ham and Harney as to the value of the property had been heard by Judge Grice; the sound of the voices of the witnesses had scarcely died out when he acted, and was made a part of the record in the motion for new trial, which was refused, and bill of exceptions filed.

When the execution exceeds in amount the value of the property levied on, it is proper for the jury to assess the value. If they do not assess the value of the property at a less sum than the amount of the fi. fa., what is the effect of the verdict? Does it mean twenty-six per cent. on the amount of the fi. fa.? If this is its effect, the amendment and construction of the verdict, by the judg-

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ment, signed and approved by the court, was beneficial to the defendant, Head. There was no conflict of evidence as to value of the property. Ham said one parcel was worth \$500.00 or \$600.00. Harvey said the other parcel was worth the same. One thousand dollars was the lowest value proved. We think, therefore, that it was error to reject the evidence offered.

An examination of the cases, in reference to amendment and construction of verdicts, will show how strictly courts adhere to the rule, "when the intention of the jury is manifest, the court will set right matter of form." Hawkes us. Crofton, 2 Burrows, 698.

Thus in Petrie vs. Harney, 3 Tenn. R., 659, the defendant had pleaded the general issue and the statute of limitation. There was a verdict for the plaintiff upon the first plea, but nothing said about the other. The court ordered the verdict to be amended, so as to make it applicable to both issues. In Clark vs. Lamb, 8 Pickering, 415, when the jury, in a general verdict, failed to pass upon an issue which applied to the same cause of action as the others, it was held that the verdict might be amended from the judge's notes.

From these and other cases we may extract this principle: that where the jury, in a general verdict, omit to pass upon some issues that do not invalidate the cause of action set forth, the verdict may be amended to conform to the evidence as given on the trial. The amendment is only made to conform to the manifest intention of the jury, which, not being expressly declared in the verdict, is ascertained from the record. Where no doubt exists, it would be an unnecessary obstruction to the administration of justice to refuse an amendment. Profatt on Jury Trial; Emerson vs. Bleckley, 2 Abb. Appeal Decisions, 22. Verdicts may be amended according to the evidence.

Verdict for \$9.80.88, construed by the "affidavit, the declaration and the proof," (40 Ga., 252) to mean \$980.88. It would seem that if objection could be properly

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made to the judgment signed and approved by the judge, in August, 1878, construing or amending the verdict, it should have been done by bill of exceptions to the action of the court.

"If the court direct the judgment entry different from and unauthorized by the verdict rendered, the proper mode to present the point for revision is to except to the action of the court." Layman vs. Hendrix, I Ala. Rep., 212.

Judgment reversed.

SASSER et ux., relators, vs. ROBERTS, sheriff.

Under article IX, section III, paragraph I of the constitution of 1877, each head of a famity is entitled to an exemption of household and kitchen furniture and provisions not exceeding \$300.00 in value, which is not affected by a waiver of homestead; but in order to carry this right into execution, the property must not only be selected by himself and wife, but also set apart by the ordinary. A mere personal claim to certain property as so selected, with no official action thereon, is not sufficient.

Homestead. Waiver. Before Judge HOOD. Terrell Superior Court. November Term, 1881.

Reported in the decision.

D. A. VASON; L. C. HOYL, for plaintiffs in error.

PICKETT & PARKS, for defendant.

SPEER, Justice.

Plaintiffs in error filed before Judge Hood, of the Pataula circuit, their petition for a mandamus nisi against defendant, as sheriff of Terrell county, setting forth the following facts:

That the defendant, as sheriff, by virtue of a certain

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judgment and mortgage ft. fa. in favor of M. H. Baldwin against petitioners, levied upon all the crop and personal property of petitioners, as set forth in the mortgage. That this included most of their property and left them destitute. They further alleged that, in compliance with law, they made out a schedule of the property included in said mortgage as being exempted from levy and sale, and gave notice thereof to the sheriff, which included fifty dollars of the furniture and 250 bushels of corn, part of the crop levied on under said mortgage fi. fa., all of the value of three hundred dollars, the amount allowed them for their family support, under the constitution and laws of this state. Petitioners demanded of the sheriff that he should not take said property thus claimed in said schedule, but that he should leave the same in their possession; but he refused to do so, and threatened to sell the same unless restrained. Wherefore they pray a mandamus nisi against said sheriff restraining him from further proceeding, and that they may be allowed to have and enjoy said property thus exempted free from litigation under said process.

To this petition the sheriff answered, that on the 15th of October, 1881, he levied a mortgage fi. fa. in favor of M. H. Baldwin against the petitioners upon two bales of cotton, 500 bushels of corn, 2,500 lbs. of fodder, 3,000 stacks of sugar-cane, 80 bushels of potatoes, one mule and a four-horse wagon, all described in the mortgage fi. fa. That a claim to said property was interposed by Mrs. J. T. Sims and proper bonds given under the claim, property delivered to claimant, and claim papers returned into court. That W. J. Sasser, for himself and as agent for his wife, in November, 1881, interposed an illegality by affidavit to said mortgage fi. fa., which respondent received and returned into court, where the same is now pending. That said petitioners failed to give any bond to replevy the property, and respondent has retained the property. Respondent does not believe petitioners have obtained Sasser et u.x., relators, vs. Roberts, sheriff.

any homestead exemption of personalty, but have merely notified respondent that they claim 250 bushels of corn levied on, and other property not levied on, with which respondent has nothing to do. He submits he is attempting as sheriff to discharge his duty, etc.

To this petition was annexed a notice given by petitioners to the sheriff, in which they say they claim of the property levied on,

Household and kitchen furniture, . . \$ 50.00 250 bushels of corn, . . . . . . . . 250.00

\$300.00

With a request to turn over such part of the same as he levied on to petitioners.

Before filing his answer the sheriff, by his counsel, demurred to said petition for *mandamus*, on the ground that the application showed no legal or sufficient reason why a *mandamus* should issue.

On the hearing of the application, the same was refused by the court, and petitioners excepted.

Did the court err in refusing this mandamus? It does not appear upon what ground the judge based his refusal.

Section I., article IX. of the constitution exempts from levy and sale to certain persons therein named (except as to certain debts) realty or personalty, or both, to the value in the aggregate of sixteen hundred dollars.

Section III of same article provides the debtor shall have power to waive or renounce in writing his right to the benefit of the exemption provided for in this article, except as to wearing apparel, and not exceeding three hundred dollars worth of household and kitchen furniture and provisions, to be selected by himself and wife, if any, and he shall not, after it is set apart, alienate and encumber the property so exempted, etc. The act approved 16th of December 1878, providing for setting apart of homesteads and exemptions of property, in the 7th section provides, in case of such waiver and the levy of an execution

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by an officer of this state, it shall be the right of the debtor and his wife, if he has any, to select and set apart as free from levy and sale three hundred dollars worth of household and kitchen furniture and provisions.

We are of opinion, that under a fair construction of the constitution and law enacted to carry the same into effect, it would be the duty of the one claiming this special exemption against a waiver of homestead, either general or special, that he must proceed to have the same set apart and exempted as provided by law in the court that has jurisdiction thereof. The constitution provides, after this three hundred dollars exemption is set apart the debtor shall not encumber or alienate the property so exempted. Who can exempt it? Not the debtor, but the court on whom jurisdiction is conferred. This construction we think is not only correct, but is supported by public policy. These exemptions are quasi trusts created in favor of the family, and there should be a record of such estates, not only for the benefit of families but to prevent imposition upon creditors.

The record in this case disclosing no such exemption of this property mentioned in the petition for *mandamus* as would protect it from levy and sale, we see no legal ground upon which this *mandamus* should have issued, and the court did not err in dismissing the same.

Judgment affirmed.

# FRANCIS vs. DICKEL & COMPANY.

- I. Since a married woman has become a feme sole as to her separate estate she may sue or be sued in respect thereto.
- 2. At common law if two were declared against as partners, no recovery could be had against one of them severally. But in Georgia where two or more defendants are joined, and it appears on the trial that some of them are not liable and ought not to have been joined in the action, the suit will not abate or be quashed on that account, but may proceed against the other defendants.

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- (a.) Objection to the evidence of several liability under a joint suit would have necessitated an amendment, but where no objection was made, a verdict against one of the defendants will not be set aside.
- (b.) Can a wife be her husband's partner in business? Quære.

Husband and Wife. Parties. Partnership. Verdict. Before Judge CLARK. City Court of Atlanta. June Term, 1881.

Reported in the decision.

HULSEY & MCAFEE; R. ARNOLD, for plaintiff in error.

HOPKINS & GLENN; W. T. TRIPPE, for defendants.

CRAWFORD, Justice.

This suit was brought by George A. Dickel & Company against Thomas Francis and his wife, Mrs. Thomas Francis, as partners, doing business under the firm name of Thomas Francis, for the recovery of a bill of merchandise. Mrs. Francis filed pleas of the general issue, no partnership, and that she was a feme covert, being the wife of Thomas Francis.

Upon these pleas the parties went to trial, and the jury found a verdict for the plaintiffs against Mrs. Thomas Francis for the amount of the debt sued.

The legal effect of the verdict was to find that she was not a partner of Thomas Francis, but engaged in business for herself, and the sole owner thereof, with liability for the debts.

Being dissatisfied with this verdict, she moved the court for a new trial, upon the statutory grounds, and because the judge charged the jury, substantially, that if Thomas Francis was an employé only, and that the business was Mrs. Francis', and she contracted the account sued on, that then they might find a verdict against her alone. Also because the judge charged, notwithstanding she was

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a married woman, yet if she had a separate estate, and this business was hers exclusively, and she contracted the debt, it would be their duty to find a verdict against her, and not against Thomas Francis. And lastly, because she was a married woman, living with her husband, and the plaintiffs cannot prosecute their suit to verdict and judgment alone against her, thereby releasing the other party.

The testimony in the record is conflicting, though there was enough to support the verdict against Mrs. Francis's pleas denying her liability. The questions, therefore, which control the case are of law.

This suit was against husband and wife as partners; the wife made the issues of non assumpsit, no partnership, and that being a married woman living with her husband, and not a free trader, she was not liable.

1. By the constitutions or 1868 and 1877, as well as by the statute of 1866, all the property of the wife owned at the date of the marriage, given to, inherited or acquired during the coverture, vests absolutely in her.

By section 1783 of the Code, the wife is declared to be a *feme sole* as to her separate estate.

In the case of Huff vs. Wright, 39 Ga., 43, it was declared by this court that husband and wife are no longer a unit, one person in law, with all the property vested in the husband as the head of the family, but so far as property is concerned two distinct persons, with separate and distinct rights. In a word, the common law rule upon this subject no longer prevails in this state. Every married woman is, as to her property, a feme sole, with power to purchase, hold and convey property, contract and be contracted with, sue and be sued as a feme sole.

This, under the new order of things, being the status of married women as to their property, rights and liabilities, why may not this wife be sued as a man could be sued, and made to respond precisely in the same manner, as to all contracts upon which she could bind her estate? We see no reason.

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2. If then a suit could be brought against partners not thus connected, and the pleadings and the proof just such as were had in this case, why should the verdict be set aside?

The allegation in the declaration was, that as partners they were indebted the amount claimed; Mrs. Francis pleaded the general issue, and no partnership; had there been a replication necessary, it would have been that the debt was due and owing, and that defendants were liable as partners. If the proofs then offered, showed that the debt was due, not by them as partners, but by one of them only, the testimony would have been demurrable under the pleadings, and could, upon objection, have been excluded until amendment had been made. None, however, was made, the jury passed upon the liability, and found the debt due by the defendant making the issues, and not by them as partners.

Was this misjoinder of parties as partners amendable? By §§3484, 3485 of the Code, it is provided that the names of partners, either as plaintiffs or defendants, which are omitted in the declaration, may be amended by adding the proper party instanter, and likewise, where two or more persons sue or are sued in the same action, the plaintiff may amend his declaration by striking out one or more of such defendants, and proceed against the remaining defendant or defendants. This was not done, and on the issue of no partnership the jury found that none existed. This finding was right on the testimony; and in the opinion of some of the members of the court for the further reason, that it is very doubtful whether husband and wife can form a partnership at all.

Conceding, then, that there was no partnership, can there be a recovery against one of them thus charged individually in this action?

We think that the principle that there can be such a recovery was ruled by this court in the case of Wooten & Company vs. Nall, 18 Ga., 609. That was a suit brought

on a promissory note signed by Wooten in his individual name, but counts alleging that the note was given for goods, wares and merchandise sold to Wooten & Kirkpatrick. were also set forth in the declaration. The defendant, Kirkpatrick, pleaded the general issue, and no partnership. After a verdict before the inferior court for the plaintiff, Kirkpatrick alone appealed, and one question considered was, whether in an action against two defendants who were declared against substantially as copartners, a judgment could be given against one defendant without the other. It was held that at common law this could not be done; but that under the laws of this state. where two or more defendants were joined, and it was made to appear on the trial that a part of them are not liable, and ought not to have been joined in the action, the suit shall not abate or be quashed on that account: but the action thereafter may proceed against the other defendant. Lumpkin, Chief Justice, says: "We are clear that the action should not abate, but that the same should proceed to final judgment and execution, in the same manner as if the defendant found not liable and discharged, had not been originally joined in the suit."

This ruling is, we think, conclusive of this case, and covers the errors of law alleged to have been committed by the judge in his charge.

Judgment affirmed.

## COOK vs. WINTER et al.

[Crawford, Justice, being disqualified did not preside in this case.]

I. Where deeds purported to convey certain lands in Alabama, and also "the buildings, outhouses, water courses, water privileges and advantages to said land belonging, or which the said Rock Island Company may have acquired from the state of Georgia;" and where it appeared from the parol testimony that for three years the Rock Island Company had been in possession of the Alabama land so conveyed, which extended into the Chattahoochee river between

Georgia and Alabama, and also of the dam extending from the western bank of the river to the factory, and were manufacturing paper thereat, such deeds were at least admissible as color of title, though the mill itself was in the river, and most of the property in Georgia.

- (a.) Of course if objection was withdrawn to their admission, no exception can be taken thereto.
- A prescriptive title was shown in this case, and the finding of the court, presiding without a jury, was right.

Evidence. Title. Deed. New Trial. Before Judge WILLIS. Muscogee Superior Court. May Term, 1881.

Reported in the decision.

PORTER INGRAM; JAMES M. SMITH, for plaintiff in error.

BLANDFORD & GARRARD; R. J. MOSES, for defendants.

SPEER, Justice.

An action of ejectment was brought by the defendant in error on the several demises of Josiah Morris and John G. Winter against Richard Roe, casual ejector, and James C. Cook, as tenant in possession, to recover a parcel of land, with the appurtenances, lying and being in the county of Muscogee and state of Georgia, known as the site of the Rock Island Paper Mills, the dam and all the power, rights, privileges, appurtenances and property of said Rock Island Paper Mills in the Chattahoochee river to high-water mark on the western side of said river, together with the island in said river known as Rock Island, being the island to which the Rock Island Paper Mills extended its dam from the factory site on the Alabama shore, said island being the first island below island number 27, containing four acres.

To this action the defendant, Cook, filed a plea of the general issue. When the case was called for trial, by agreement of counsel, it was consented that the cause

should be tried before his honor J. T. Willis, the judge presiding, both upon the law and facts without the intervention of a jury, with the right of either party to except and to move for a new trial as if the said case were tried in the usual way. On hearing the evidence and after argument had, the judge rendered a judgment finding in favor of the plaintiff in ejectment the premises in dispute. Whereupon the defendant below made a motion for new trial on various grounds; it was overruled, and he excepted and assigned the same as error.

- (1.) The first ground of alleged error is that the court erred when plaintiff offered to read in evidence the deed made by R. J. Moses and H. Hull to R. L. Mott. The defendant objected to the same upon the ground that it was not pertinent to the issue, and among other grounds, that it purported to convey lands in Alabama and on the Chattahoochee river and could convey no title east, and beyond high-water mark on said river, which objection was overruled by the court.
- (2.) Because the court erred in admitting in evidence the deed from R. L. Mott and wife to the Rock Island Paper Mills for the same premises, over the objection of defendant.
- (3.) Because the court erred in deciding that plaintiff had acquired title to the premises by prescription.
- (4.) Because the finding and judgment of the court was contrary to law.
- (5.) Because the finding and judgment of the court was without evidence and against the weight of evidence.

We may properly consider the first and second grounds of the motion as one, as both deeds objected to, according to the view taken by plaintiff in error, were inadmissible for the same reason, to-wit, because they were irrelevant. These deeds were not only offered as evidence of the title to the premises in dispute, but as color of title, to support the prescription set up by plaintiff below. We think, under this view, the deeds at least were admissible. The deed from Moses and Hull, as trustees, not only pur-

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ports to convey to R. L. Mott the section of land lying in Russell county, state of Alabama, but also all and singular the buildings, out-houses, water-courses, water privileges and advantages to said land belonging, or which the said Rock Island Company may have acquired from the state of Georgia. It is evident that these water privileges could not be fairly construed as being limited to lands lying in the state of Alabama, for this state could grant no privilege within a foreign jurisdiction; and especially were these deeds admissible when it was proved that, at the time the deed was made and for three years before, the Rock Island Company was in possession of the Alabama land conveyed in the deed of that company, which was in the river, and the dam that runs from the Rock Island Factory to the western bank of the river and from the mill to the Rock Island property called Rock Island, and that the company were manufacturing paper at the time; that the company had bonds out, and that Moses and Hull were appointed trustees to sell it. If there was any ambiguity as to the property conveyed by these deeds, this evidence explains it, and as such they were admissible in evidence for the purposes for which they were offered. It appears, further, from the record, that when this parol evidence was given in, all objections to the admissibility of the deed was withdrawn and the deed was then read.

2. The third ground of error assigned is on the ground that the court erred in deciding "that plaintiff had acquired title to the premises by prescription."

The evidence showed that the Rock Island Company was in possession of the premises sued for three years prior to June, 1849, and that Moses and Hull, as trustees of that company, made a deed of the premises to R. L. Mott, who entered under it in 1855, and in 1856 he conveyed to the "Rock Island Paper Mill Company," and that this company remained in possession until the mill was burned, in April, 1865. Subsequently it appears that a

judgment was rendered against the Rock Island Paper Mill Company, in April, 1868, and under a fi. fa. issued thereon a levy was made upon the premises in dispute, including Rock Island, the site of the mill, with all the appurtenances and water-power on the river, and the same. in July, 1860, was sold by the sheriff at public outcry, and bid off by Josiah Morris, and a deed to Morris for the property was, by the sheriff, made in April, 1860. Under this evidence, we think an adverse, uninterrupted, continued and peaceable possession was shown, under color of title, from 1855 to 1865, a period of ten years, and counting out the period of the statutory suspension, leaves nearly nine years of adverse possession under color of title, had the plaintiffs gone no further. Other witnesses show the possession commenced between 1843 and 1848. Counting from the mean of these respective dates and the prescription would have run from October, 1847, to April, 1865, a period of nearly eighteen years. If to this be added the possession after the burning until the sale by the sheriff, in 1860, it makes a period of more than twenty years.

As to the fourth and fifth grounds of error, they are disposed of by overruling the third ground.

The plaintiff sued to recover, relying on his title by prescription, and we think the action is fully sustained by the proof, both by a prescription of seven years under color of title and also the twenty years' adverse possession under the statute. Whatever may, therefore, have been the merits of the defence, as appears from the record, under the evidence, we cannot see how it can avail as against the title of the plaintiff, accruing from the lapse of time that has run in his favor. There is no evidence of abandonment of the property that would bar the plaintiff's right to recover upon his prescription. The property was not habitable, or fit for use except for manufacturing purposes, and we are not inclined to think the mere omission to rebuild either the buildings destroyed or use

the dam, can be construed into an abandonment of a property that the plaintiff, and those under whom he held, had been in the public, continuous, exclusive, uninterrupted and peaceable possession of, under a claim of right, for more than twenty years.

Let the judgment of the court below be affirmed.

# BLANCE vs. GOODNOW.

- r. Where D. delivered to G. certain promissory notes unsigned, and G. gave to him a written contract stating that they were received as collateral and agreeing that upon the payment by D. of certain debts that he (G.) would deliver to D. the notes signed by himself and associates, or in default of payment by D, he would collect enough to pay the debts and turn over balance to D. such a contract did not amount to a promise to pay money, so as to form the basis of an action therefor.
- (a.) On compliance with the condition precedent, trover to recover actual possession, or a bill for specific performance, would lie.
- 2. A parol purchase of lands is obnoxious to the statute of frauds.

Contracts. Debtor and Creditor. Titles. Before Judge HILLYER. Fulton Superior Court. April Term, 1881.

Reported in the decision.

E. N. BROYLES, by brief, for plaintiff in error.

JULIUS L. BROWN; WM. T. NEWMAN, for defendant.

SPEER, Justice.

This was a suit brought by plaintiff in error in complaint to recover the sum of \$7,500.00, besides interest. There were several counts in the declaration.

The first was to recover \$7,500.00, with interest, on a written promise to pay, and due in three instalments as follows, to-wit: One instalment of \$3,500.00, due January

10th, 1874; one other instalment of a like sum, due July 10th, 1874, and the other instalment of \$500.00 due January 10th, 1875, which sums of money he refuses to pay; which promise was made to Jas. F. Dever, and by him assigned to plaintiff for value.

The second count is for a like sum of \$7,500.00, besides interest, on an account, as will appear by a bill of particulars annexed, which defendant refuses to pay, which account was originally due and payable to Jas. F. Dever, and afterwards, to wit, on July 31st, 1873, was duly transferred and assigned by Dever to plaintiff for value.

The third count alleged that on the 31st day of July, 1873, the said defendant, for the consideration hereinafter stated, undertook and promised said Jas. F. Dever in writing within sixty days from said date to execute and deliver to said Dever, for his use, three several promissory notes, each to bear date July 10th, 1873, signed by said William Goodnow and his associates, no names of associates being given, one of said notes to be for \$3,500.00, and to become due at six months from its date; one other note for \$3,500.00, and to become due twelve months from its date, and one for \$500.00, to become due at eighteen months from its date, the consideration of which said promise was the purchase money of the right and interest which the said Dever then owned and had, the same being an undivided half interest in and to lots of land No. 926, 927 and 7 acres of lot 924, all in the 21st district of the - section of said county of Polk, said seven acres being the southwest corner of said lot 924, which interest of said Dever was then and there sold by said Dever to said Goodnow. Plaintiff further says that said defendant wholly failed and refused to execute or deliver either of said notes to said Dever, or for his use, within the said sixty days, and has so failed and refused to do so till this date, though often requested so to do. Defendant was requested to execute said notes by plaintiff and his attorney on the - day of August, 1874, by reason of which

failure and refusal plaintiff saith that said defendant then and there, to-wit, on the expiration of said sixty days from the 31st day of July, 1873, became liable and bound to pay the said Dever the several sums of money aforesaid, for which several notes are to be given as aforesaid, and yet though so indebted and liable, the said defendant fails and refuses to pay said sums or either of them, which said written promise said Dever has assigned to plaintiff for a valuable consideration.

Further, plaintiff alleges that heretofore, to-wit, on July 31st, 1873, said defendant in writing promised said James F. Dever, within a reasonable time from said date, to make and execute to said Dever the said three notes described in the count next immediately preceding this for the consideration in said last named count mentioned; said defendant by said contract, when said notes should be made. was to hold the same as collateral security to a note for \$1,200.00, made by said Dever to said defendant, dated July 31st, 1873, and due sixty days after date. By said contract, if said defendant paid said \$1,200.00 note and the sum of \$320.00 to O. A. Lochrane, then said defendant was to turn over said notes to said Dever, and on said Dever's failure to pay said \$1,200.00 note and the sum of \$320.00 to said Lochrane, said defendant was to collect enough from said three notes so to be made as aforesaid to pay said \$1,200.00 note and said Lochrane, and to turn over balance cash and notes to him, said Dever or to his order. Plaintiff avers that had said Goodnow complied with his said contract in giving said three notes, the defendant could, by reasonable diligence, long ere this have collected from the same enough to have paid off said \$1,200.00 and the said sum of \$320.00 to said Lochrane. But it is the fault and neglect of defendant to comply with his said contract, that the said notes have not been executed, although a reasonable time has long since passed. Plaintiff by his attorney, on August -, 1874, demanded of defendant the execution of said note: and

that no money has been collected on said note, and by which default and neglect of defendant the said defendant has become liable to pay said sums of money, amounting to the sum of \$7,500.00, besides interest, and which said promise the said Dever afterwards assigned to plaintiff, whereby defendant became liable to plaintiff, etc.

The copy of the contract sued on was in the following words:

"ATLANTA, July 31, 1873.

Received from J. F. Dever, three notes as follows: Two notes dated tenth day of July, 1873, and due respectively at six months and twelve months from date, for \$3,500.00 each; one note of same date for \$500.00, due at eighteen months after date, which notes I hold collateral to a loan of \$1,200.00, on his note dated July 31, 1873, and due at sixty days after date; if Dever shall pay his note then, I am to turn over said note to him—on his paying said note and \$320.00 going to 0. A. Lochrane, and on failure I am to collect enough to pay said note and said Lochrane, and then said balance cash and note to him or his order. (Signed) WILLIAM GOODNOW."

"The three notes above referred to are to be signed by William Goodnow and his associates. WILLIAM GOODNOW."

#### CREDIT.

"Received on the within of William Goodnow, two hundred dollars. February 26th, 1874.

JOSEPH A. BLANCE,

Attorney at law for J. F. Dever."

#### COPY OF ASSIGNMENT.

"For value received, I assign the within, all my right and interest connected with and growing out of the same, to Joseph A. Blance.

(Signed)

JAMES F. DEVER."

There was also attached to said declaration a copy of a bill of particulars setting forth that the defendant was indebted to plaintiff for part purchase money of said land described, amounting to \$7,500, with an assignment thereof by Dever to Blance.

To this declaration defendant filed several pleas, to which a demurrer was made and overruled; but under our view of the case it is unnecessary to consider them.

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When the plaintiff had closed his testimony, the defendant moved a nonsuit, which the court allowed, and plaintiff excepted.

Was the court right in granting this nonsuit under the evidence? Could a recovery be had upon this paper sued upon as a money demand? Was there any promise or undertaking on the part of the defendant and his associates to pay the plaintiff the amount or any amount of money unconditionally?

It may be noted from the whole paper that it was in the hands of Goodnow as a collateral, to secure him for a note of twelve hundred dollars due him by Dever, and the legal condition of the contract was that that amount must be paid or tendered to Goodnow, before any recovery could be had on the paper itself as a money demand.

But apart from this obstacle, what was the undertaking of Goodnow? It was, if Dever should pay his note, then "I am to turn over said notes to him, on his paying said note and three hundred and twenty dollars going to O. A. Lochrane; and on failure, I am to collect enough to pay said note and said Lochrane, and turn over balance cash and note to him or his order. The three notes above referred to are to be signed by William Goodnow and his associates."

It appears from the contract that the notes for which defendant is sought to be made liable were never signed, either by Goodnow or his associates; but there was an agreement, on condition that Dever paid the twelve hundred dollar note to Goodnow and the three hundred and twenty dollars to O. A. Lochrane, then he, Goodnow, and his associates were to sign the notes and become liable.

The count declared on and founded upon a bill of particulars attached, for the purchase money of land, would be obnoxious to the statute of frauds, and void as being a contract not in writing, the same appearing to be for the sale of an interest in lands. Code, §1950.

While we hold that no recovery could be had on this

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paper as a money demand, as set forth, we do not say that the payee or owner might not have redress in equity for a specific performance, or by suit in trover; but in either case a demand and refusal must have been averred and proved, and also payment or a tender of the money due Goodnow and Lochrane, in conformity with the terms of the contract.

Let the judgment of the court awarding the nonsuit be affirmed.

# LOVE vs. Cox, sheriff, et al.

- 1. A laborer has a special lien on particular property, and also a general lien on all the property of his employer for work done, and if properly asserted, it will date from the completion of the work. But in order to receive the advantage of this lien, it must be foreclosed as provided by law, and, as to realty, recorded.
- (a.) Where a laborer neither recorded nor foreclosed his lien as such, but brought complaint on an open account for the amount due him, and recovered judgment, his claim was postponed to judgments junior to the performance of the work but senior to the date of his judgment.
- 2. That a laborer desires to claim a general lien on all the property of his employer and is unable to describe such property specifically, does not relieve him from asserting his lien and enforcing it as such. He need not do an impossible thing.
- (a.) Nor does it matter that he might be compelled to enforce his lien on the personalty of his employer in one action and on the realty in another.

Liens. Judgments. Pleadings. Before Judge FAIN. Whitfield Superior Court. April Term, 1881.

This was a rule brought by John P. Love, the plaintiff in error, against Cox, the sheriff of Whitfield county, calling upon him to show cause why he should not pay over to him enough of the money in his hands to satisfy his fi. fas. The sheriff had sold a large lot of real property belonging to the Dalton City Company, under vari-

Love vs. Cox, sheriff, et al.

ous fi. fas., and the money was in his hands held up under notice from said Love. The sheriff answered the rule, setting out in extenso the lots sold and the amount realized therefrom, the amount in hand, and that he had older fi. fas. in his hands in favor of D. A. Walker sufficient to consume the fund. Thereupon John P. Love tendered an issue, alleging that, although the fi. fas. in favor of Walker were of older date than his, still he had the better lien, as his judgment was based on an account for labor done for the Dalton City Company, and that he claimed a general lien upon all the property of the Dalton City Company. The whole question was submitted, both on the law and facts, to the judge. The judgment and account in favor of Love, sued on, were read in evidence. The record of Love's judgment was admitted to be as follows: On the 30th of September, 1876, John P. Love sued the Dalton City Company for labor done as a mechanic prior to August, 1875, on the Duff Green hotel, the property of said company; the defendant was duly served with process, and on the 20th of October, 1877, a verdict and judgment were rendered in favor of said Love vs. the company, for the sum of \$260.35, besides interest and costs. The suit was the common action of complaint, and no lien was claimed in the declaration, or set out, and no record of any lien introduced in evidence. swore that the work was done by him on the Duff Green hotel, then being built by the Dalton City Company, that the items charged for day labor were for labor, and were correct, and that the piece work done by him was done out of the regular hours of labor, that 10 hours were a day's work, and he did the piece work outside of the 10 hours. That the prices were usual and reasonable, and that he completed his work and contract early in August, 1875.

The court awarded the money to the D. A. Walker fi. fas. because Love had not recorded his lien and commenced suit within twelve months.

Love vs. Cox, sheriff, et al.

B. Z. HERNDON; W. K. MOORE, for plaintiff in error.

JOHNSON & McCAMY, for defendants.

JACKSON, Chief Justice.

The question made in this record is whether the general lien of a laborer, unrecorded and unforeclosed, has preference over a judgment creditor whose judgment is older than the judgment of the laborer, though younger than the date of his labor or of its completion. The court below gave the preference to the judgment creditor, and, on that ruling, error is assigned in this court.

The laborer sued on his open account for work done as a mechanic, but did not claim any lien, and merely brought suit on his account and got a general judgment therefor.

There can be no doubt that the laborer has not only a special lien on the premises he works upon, but also a general lien on all the property of his employer, and that when he complies with the remedies provided by law for the assertion of this lien, it operates from the completion of the work. Acts of 1873, p. 42. Code, §§1974-5-6.

What must the laborer do in order to assert this lien and make it a valid lien against the property of his employer? Section 17 of the act of 1873, on page 46 of the Acts of 1873, declares how all liens on real and personal property, under that act (not otherwise provided for, and this is not) shall be foreclosed, and on what terms the lien is to be valid; and so does the Code, in §\$1990 and 1991, where this provision is codified. He must record his claim and commence suit within the time prescribed in section 1980 of the Code—that is, within thirty days he must record it, and within twelve months commence suit. The reason of the law is as obvious as the law itself is plain. Other creditors should know what liens are on the debtor's property, and the debtor should not be crippled in getting credit by having a lien, resting purely in parol evi-

dence, covering his entire estate. In this case the laborer did nothing of the sort, and the evidence of his asserted lien reposed in his own breast until this property was sold and the money in the sheriff's hands.

But it is said that he could not pursue the remedy provided by law, because his lien was on all of his employer's property, and he could not specify. The answer is in 43 Ga., 9. He need not do what he could not do. All that he had to do was to record his claim and assert his lien on all the real property of the debtor.

It is said again that his right of lien operated on personalty as well as realty, and he could not pursue both in one proceeding, because the remedies provided in the one case differ from those in the other. Very well. Let him then proceed upon all the personalty, under the law applicable to it, and upon the realty on the law applicable to that sort of property. Just as if he has a claim to personalty and realty in the possession of one and the same man, his remedy would be trover for personalty and ejectment for realty; or, if he held a mortgage on real and personal property in the same deed, he would foreclose for the real estate, according to its appropriate mode, and against the personal estate in the manner prescribed for foreclosure as to that.

In our view, the question is scarcely questionable, and the judgment of the court below is affirmed.

Judgment affirmed.

# BUTTS et al. vs. LITTLE et al.

1. For a county to contract for the erection of a building at a specified price, which is to be completed by a certain date, and payment for which is to be made as the work progresses, on estimates to be made by certain architects, less fifteen per cent, is in effect a contract to pay the price agreed on by the date of completion fixed; and where the amount thereof is more than can constitutionally be raised by taxation (without authority of the voters exhibited by an election) it is to incur a debt not authorized by such constitution.

- 2. The effect of article VII, section VII, paragraph I of the constitution of 1877, on the incurring of debts by towns or counties is as follows:
- (a.) The debt incurred by them shall in no event exceed seven per cent. on the taxable property, except as stated below.
- (b.) No new debt, even up to seven per cent., shall be incurred without the assent of two-thirds of the qualified voters at an election for that purpose to be held as may be required by law, except that a debt of not above one-fifth of one per cent may be made to meet casual deficiencies.
- (c.) But any city whose debt did not exceed seven per cent on its taxable property might, under properly received authority, increase the debt three per cent.
- (d.) The words "except as in this constitution provided for" in the early part of the section, refer to the otherwise inconsistent provisions further on in the same section.

Constitutional Law. Debtor and Creditor. County Matters. Before Judge POTTLE. Hancock County. At Chambers. December 12th, 1881.

Reported in the decision.

DUBIGNON & WHITFIELD, for the plaintiffs in error.

SEABORN REESE; F. L. LITTLE, for defendants.

SPEER, Justice.

Plaintiffs in error filed their bill for injunction, relief, etc., in Hancock superior court, against the defendants, alleging that they were tax payers in and of said county, that at the April term, 1880, of said superior court, the grand jury thereof recommended a levy of a tax of one-fifth of one per cent be levied on the taxable property of said county for the years 1880 and 1881, for the purpose of erecting a court-house for said county, not to exceed in value \$10,000.00, and also by their action appointed the defendants in error to act in the premises as a committee to have said building erected. That said parties so appointed entered, in August, 1881, into a contract with one James Smith, contractor, for the construction of said

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court-house, at a cost of \$24,495.00. It is further alleged, that this sum is extraordinary in amount, and not necessary to construct such a building as is suitable for the county That the tax recommended by the grand jury of 1880 and 1881 will be wholly inadequate to discharge said sum of \$24,495.00, and that after applying the taxes levied on the first day of October, 1882, the time specified for the completion of said contract, the large sum of \$14.495.00 will remain unpaid, and for the payment of which no provision has been made. That there are no surplus funds in the treasury of the county to pay said debt: nor any other means by which said debt can be paid, other than by levving a special tax therefor. It is further alleged that a levy of one-fifth of one per cent on the value of the taxable property of said county will raise less than five thousand dollars, and the purpose for which said new debt was contracted not falling within the exception specified, and no election, therefore, being had as provided, is expressly prohibited in paragraph I, section VII, article VII, of the constitution of 1877.

The prayer is, that the contract made by the defendants be declared void, and they be enjoined from further prosecuting or proceeding with said building under the contract aforesaid. That Frank Little, the county judge; be enjoined from levying any further tax to meet the same, and the tax collector from collecting the same, and the county treasurer from paying out any funds, now in or that may come to his hands in settlement of said debt.

The answer of the defendants sets forth the action of the grand jury as set forth in the bill, but further answer that the grand jury, at the October term, 1880, concurring with the committee as to the inadequacy of the sum provided for by the previous grand jury, recommended a levy of a tax of one-fifth of one per cent on the assessed value of the taxable property of Hancock county for the year 1882, and whatever further sum might be found necessary to complete the building, be raised by proper authority, and

instructing said committee at the earliest time practicable to enter upon the discharge of their duty. The answer admits the making of the contract, its terms, etc.; they claim that after levying and paying the taxes of one-fifth of one per cent for the years 1880, 1881, 1882, as recommended by the grand juries, there will remain a small balance of the contract price for the court-house unpaid, which can be easily discharged in a few years by a continuation of said tax of one-fifth of one per cent on the taxable property of said county.

On the hearing of the bill, and answer, the chancellor refused the injunction; whereupon complainants excepted.

It is alleged by the bill and admitted by the answer, that of the debt contracted by the building committee, after the taxes of 1880, 1881 and 1882 have been levied and collected, of one-fifth of one per cent for those years to meet this contract, there will still remain a balance due by said county to be provided for by future levies of one fifth of one per cent on the taxable property of said county. What the amount of this unpaid balance may be is not stated in the answer, or even approximated. The question submitted then is, whether this debt by this contract can be incurred under the provisions of the constitution cited.

Paragraph I, section VII, of article VII, of the constitution declares: "The debt hereafter incurred by any county, municipal corporation, or political division of this state, except as in this constitution provided for, shall never exceed seven per centum of the assessed value of all the taxable property therein, and no such municipality or division shall incur any new debt, except for a temporary loan or loans, to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law; but any city, the debt of which does not exceed seven

per centum of the assessed value of the taxable property at the time of the adoption of this constitution, may be authorized by law to increase at any time the amount of said debt three per centum upon such assessed valuation."

The alleged and admitted facts of this record show that this building committee on the part of the county have, by contract with Smith, made an engagement for him to build a court-house for said county according to plans and specifications therein stated under the authority of the grand jury of said county, and finish and complete the same on or before the first day of October, 1882, for the sum of twenty-four thousand nine hundred and ninety-five dollars, the same to be paid for as the work progresses, on an estimate to be made by certain architects, less fifteen per cent. If said installments are not paid in five days on the estimates made, then the contractor may cease work and may demand twenty per cent on said installment, and work to be resumed as soon as said installment is paid. If the contractor fails to finish the work by first of October, 1882, then he is to pay on demand to the committee as rent, three hundred dollars for every month between the time appointed and time the work is completed.

This is a contract to pay (if the contractor carries out in good faith his contract) on the part of the county, \$24,495.00 for a building, to be completed first of October, 1882; and to meet which they have levied taxes, and collected the sum of one-fifth of one per cent for the years 1880, 1881, amounting to about \$10,000.00; and estimating the tax of 1882 at the same amount, as recommended by the grand jury, there will be a deficit when this work is done of nearly \$10,000.00 under the contract as due by this county.

The question made by the plaintiffs is, that this debt so contracted for, is illegal and void under the constitution, and the execution of the same is sought to be enjoined.

Paragraph I, section VII, of article VII, has been con-

strued by this court three times—first, in the case of Hudson vs. Mayor etc., of Marietta, 64 Ga., 286, in which this court held that, "the municipality has no authority, under the constitution of 1877, to incur a debt of \$3,000.00, in order to exchange an old fire-engine for a steamer, until there has been an election held according to a law prescribing the manner thereof." Again, in the case of Spann vs. The Board of Commissioners of Webster County, and at this term, in the case of Walsh vs. City of Augusta. With the aid of the light of these decisions, let us analyze this paragraph and interpret its meaning. The substance of the paragraph is foreshadowed, in the preliminary or prefacing clause, in these words: "Debt of counties and cities not to exceed seven per cent."

The paragraph declares the debt "hereinafter incurred of any county, municipal corporation, or political division of this state, except as in this constitution provided, shall never exceed seven per centum of the assessed value of the taxable property."

There is, then, a further limitation prescribed as to incurring such new debt, even up to seven per cent. What is it? "No such county, municipality, etc., shall incur any new debt, except for temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per cent. of the assessed value of the taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law."

First: We have, then, the absolute prohibition against a county incurring any new debt exceeding seven per centum on its taxable property.

Second: We have a prohibition against a county incurring any debt (exceeding one-fifth of one per cent. to supply casual deficiencies of revenue) "without the assent of twothirds of the voters, at an election for that purpose, to be held as may be prescribed by law."

The question, then, for our consideration is, does this

contract, entered into by these defendants in error, when consummated by the completion of the building, "create a debt against the county?" Is it a new debt incurred that "exceeds one-fifth of one per cent. of the assessed value of the taxable property therein?" The bill so charges, and the answer admits it to be true. How, then, can this contract be legal, that assumes to incur a new debt for the county (exceeding one-fifth of one per cent. on its taxable property), when the question of incurring this debt has not been submitted to a vote, with the two-thirds in its favor, at an election held for that purpose, as may be prescribed by law?

But it is insisted that the words in the paragraph under consideration, "except as in this constitution provided for," will relieve, and were intended to except new debts incurred for such purposes (such as public buildings, etc.,) as are mentioned in paragraph II, section VI, article VII of the same instrument. What is that section? Its preface is: "Counties—power to tax limited." It declares the "general assembly shall not have power to delegate to any county the right to levy a tax for any purpose, except for educational purposes (in elementary branches), to build and repair the public buildings and bridges, to maintain and support prisoners, to pay jurors, coroners, and for litigation, quarantine, roads and expenses of courts, to support paupers, and pay debts heretofore existing."

It is quite clear this paragraph simply denies to the legislature the authority to delegate to counties the power to levy taxes for any purposes beyond those just above specified. The paragraph is not akin or germain to the paragraph following, and now under consideration. That paragraph is on the subject of taxation, and not on the subject of counties and cities incurring debts.

But to what do the words "except as in this constitution provided for" refer, it is asked, if they do not refer to the paragraph preceding? We find use for these words in the same paragraph. The paragraph opens with an absolute

prohibition against any county, city, etc., incurring a debt "exceeding seven per cent;" but in the latter part of the same paragraph it declares, "any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of the constitution, may be authorized by law to increase, at any time, the amount of said debt three per centum upon such valuation." Now the first prohibition against a county or city creating a new debt over seven per cent., would be inconsistent with the last clause of the same paragraph, were it not for the words "except as in this constitution provided for."

Suppose the city of Augusta owed a debt over seven per cent. on her taxable property, then she cannot incur a new debt; but suppose the city of Rome at the adoption of the constitution owed a debt of only six per cent. on her taxable property, then she may increase it three per cent. more, for the constitution clearly provides that any city the debt of which does not exceed seven per cent. at the time of the adoption of the constitution, may be authorized by law to increase at any time the amount of said debt three per centum. It, therefore, requires these words, "except as in the constitution provided," to harmonize the first and last clauses in the paragraph in which they occur. Otherwise these clauses would be inconsistent and irreconcilable. Our opinion is, therefore, that these words have no reference to the preceding paragraph, which relates alone That the limitation upon the cities and to taxation. counties to incur new debts are to be found in paragraph I, section VII, of article VII, and under it we hold:

- 1. That any city or county which at that time owed a debt which exceeded seven per cent. on the assessed value of her taxable property, could not increase that debt, only to the extent of one-fifth of one per cent. to provide for casual deficiencies of revenue.
- 2. That any city whose debt did not exceed seven per cent., might by authority of law and a vote of two-thirds

of her voters, add to this debt three per cent. upon the debt incurred, as well as levy, at her will, one-fifth of one per cent. to meet casual deficiencies of revenue.

3. But that, without reference to the debt, whether over or under seven per cent, neither county nor city can incur any debt for any purpose whatever exceeding one-fifth of one per cent. upon her taxable property to supply casual deficiencies of her revenue, unless she has authority of law for so doing, and the same is, in conformity to that law, submitted to a popular vote, and two-thirds of the qualified voters assent thereto.

With these views of constitutional limitations and restrictions, we must hold that this contract to build this court-house on the terms specified, is incurring a debt for the county of Hancock in a manner prohibited by the constitution, and the injunction asked for should have been granted.

We appreciate the importance of the interest involved, and the necessity there is for the proper administration of justice and the preservation of county records, that a suitable court-house should be erected, but we cannot override the constitution to meet the emergencies of particular cases. It is the supreme law, and we are bound to recognize and enforce its provisions when parties litigant seek its protection against illegal taxes threatened, or illegal contracts sought to be discharged by illegal levies hereafter to be made.

If the parties to this contract can so modify it that the cost of this building can, as it falls due, be met annually hereafter by a levy of one-fifth of one per cent. on the assessed value of the taxable property of said county, the injunction ordered may be altered so as to meet this modification; otherwise to incur or pay this debt sought to be incurred, application must be made to the law-making power, if none such now exists in this case, for permission to have an election, and with the assent of two-thirds of the qualified voters assenting thereto, the debt may be incurred and the house completed.

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Let the judgment below be reversed unless the liability to be incurred shall be so arranged as not to exceed onefifth of one per cent. annually on the assessed value of the taxable property of the county of Hancock; and in that event the judgment below stands affirmed.

Judgment reversed on terms.

# HODGES et al. vs. HIGHTOWER et al.

A man, as head of a family consisting of a wife and children, applied for a homestead. A caveat was filed, and while it was pending the land was sold at judicial sale, and the caveator and another, with full notice, bought it. Appraisers were appointed, and on their return the schedule was approved. The caveator appealed, and pending the appeal the applicant died:

Held, that a bill would lie at the instance of the widow and children to have them subrogated to the rights of the applicant, to enforce their right to the homestead, and to compel the purchasers to pay over the rents and profits arising from the land since the original grant of the homestead.

Equity. Homestead. Before Judge CRISP. Stewart Superior Court. April Term, 1881.

Reported in the decision.

R. L. WATTS; W. A. LITTLE, for plaintiffs in error.

T. D. HIGHTOWER; E. H. BEALL; J. L. WIMBERLY; GUERRY & SON, for defendants.

SPEER, Justice.

John L. Hodges, the husband of plaintiff in error, being the head of a family consisting of his wife and eight minor children, applied to the ordinary of Stewart county for setting apart a homestead in realty and personalty, on 5th July, 1875, including in his schedule a house and lot

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in Lumpkin, Stewart county. C. J. Tucker, a creditor, filed a caveat thereto. In August, 1875, the house and lot were sold at sheriff's sale, and C. J. Tucker, the caveator, and T. D. Hightower, purchased it, with full notice of the application of Hodges. Appraisers were appointed under the caveat, and they made a return, valuing the property within the homestead limits, and the ordinary approved The caveator appealed to the superior the schedule. court. Pending the appeal, and before the same was heard, John L. Hodges, the applicant, died. This bill was filed by his wife and minor children, against the caveators, asking that, as the head of the family of the same minor children, she might be subrogated to the rights he had at the time of his death. It is further alleged that the caveator, Tucker, and Hightower, since said sheriff's sale, have received the rents and profits of the aforesaid house and lot and withheld the same from petitioner and her children, and still continue to hold the same, of the annual value of \$100.00 for rent, to which complainants claim Her prayer is for an order of the court to make complainant and her children parties to the homestead application now pending; that a decree may be had to have the property surveyed as a homestead, and the personalty returned by the commissioners set apart as a homestead, for the sole use of complainant and her children; that the defendants may be decreed to pay rents and profits arising from the use of the property, as the proceeds of the homestead. To this bill defendants demurred, on the grounds.

- (1.) There was no equity in the bill.
- (2.) That complainant has a complete remedy at law.

The court below sustained the demurrer and dismissed the bill; whereupon complainant excepted.

The right to a homestead is a right created by the fundamental law and the statutes of the state.

Article VII, section I, of the constitution of 1868, under which complainant by her bill seeks to have decreed this homestead to be set apart, provides "each head of a family

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or guardian, or trustee of a family of minor children, shall be entitled to a homestead of realty to the value of \$2,000.00, and personal property to the value of \$1,000.00, both to be valued at the time they are set apart." This court has by construction extended this right to a widow and minor children of a deceased husband, who are likewise entitled to this exemption out of the estate of the deceased husband and father. 40 Ga., 439. is made by law as to how and in what manner and to what court this application shall be made. Code, \$2002, and sections following. The husband and father having applied, on his death the suit does not survive to his representative, for there is no provision made for his representative, either to institute the application originally or to be made a party in case of his death. This application has been well analogized to a suit, under the statute, instituted by the applicant to recover out of the property specified a use and enjoyment for the benefit of the wife and children, to be exempt from levy and sale during the existence of said family. It is a cause of action granted by the constitution, and which the laws frame a remedy to enforce, and for this remedy the original exclusive jurisdiction is vested in the court of ordinary. The husband, as the head of the family, may be said to have the prior right to apply; on his failure or refusal the wife may apply, if he does not object. the husband objects, the wife's right is denied. several rights of the head of the family, wife, widow, guardian or trustee, are thus provided with an appropriate remedy, distinct and clearly defined so long as the applicant remains in life. On the death of such applicant, there is no special provision made by law for a representative to be made a party to conduct the suit to a final issue.

It is evident that, had the husband survived, the constitution and laws would have afforded to him, as the head of a family, a homestaed out of the property for the use Hodges et al. vs. Hightower et al.

of his family so long as they were under the law entitled to the benefits thereof; and this too would have been secured to them notwithstanding the judicial sale made of this property and its purchase by the respondents, since at the time of said sale said application for homestead was pending, and they had notice thereof.

Shall it be said this right to secure this invaluable boon to the family is to be defeated by reason of the untimely death of the head of the family? So far from this event depriving the beneficiaries of this constitutional shield and protection against creditors, it only makes it the more to be prized and needed in the loss of their natural protector. Toward this application the husband was the acting trustee to secure to his family this estate in the nature of a trust for their benefit. Shall it fail if the trustee dies? We think not. It is true there is no special provision made by law for having either the representative of such deceased applicant or his widow to be made a party to such a proceeding, so as to proceed as in ordinary suits where one of the parties dies. But here, under the constitution and laws, was a clear right in this family, through the husband and father as the head, to this estate for their use, and he was seeking to secure this right for them at the time of his death. Shall this trust. inchoate and imperfect though it be, so solemnly recognized, fail for the want of a trustee to represent the beneficiaries, or a remedy to secure it? Code, section 3250, declares for every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other. In the absence of any specific remedy. owing to the character of the estate and the relation the parties sustain to it, and especially under the peculiar facts of this case, where the estate sought to be set apart has by judicial sale passed from the applicants without fault on their part, though without affecting their rights, and where in such case it would be eminently proper to recover by a decree the property at the time it was as-

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signed, so as to secure to complainants full and complete relief under one decree, we think it a proper case for the interposition and aid of a court of chancery.

In life, with the assent of the husband, the wife is entitled to a homestead in his estate. After death this right survives to the widow, though the title may have passed to the heirs at law.

Why should not this right remain to her in all its force, and with all its benefits, when he dies pending his application? And if there be no special provision by law for her to be heard, why may not a court of chancery afford the relief, and open its doors to her petition, and frame a remedy to meet the exigencies of her complaint? Probably, in an ordinary case, where there had been no sale or transfer of the possession of the property from the applicants, a mere petition to the court to make the widow a party plaintiff would have been sufficient to proceed with, but under the peculiar facts of this case we think a resort to chancery is the better course to secure full and complete relief, as is sought to be done here, under one general decree to be rendered on the law and facts.

Let the judgment of the court below dismissing complainants' bill be reversed.

JACKSON, Chief Justice, concurred on special grounds, but furnished no written opinion.

# CRAWFORD, Justice, concurring:

I fully concur with the majority of the court in its judgment, so far as it adjudges that the complainant here is not precluded from her right of application for homestead, and in the property specified, if as is alleged, the present holders bought under notice of the pendency of the husband's application therefor. But I cannot recognize any power in a court of chancery to entertain original jurisdiction in matters of setting apart a homestead. That power is lodged elsewhere, and I think, for this complain

Rogers vs. Craig.

nant, is full and complete. Besides, courts of chancery have been continuously enlarging their powers until, in the language of a distinguished English judge, long ago expressed, they have eaten out the very heart of the common law. For myself, therefore, I am for limiting these powers strictly to "the correction of that wherein the law—by reason of its universality—is deficient." Especially should this be so when it is remembered that equity originated in and continues to be nothing more nor less than bench legislation.

#### ROGERS vs. CRAIG.\*

I. If a man's family permanently reside in this state, the superior court of the county of their residence has jurisdiction of a case against him, and service by leaving a copy of the writ at his residence is sufficient, though he himself is absent and has been so for a considerable time, he not being permanently separated from his wife and family. Code, §1690.

It appearing from the record that this case was brought to the supreme court for delay only, damages are awarded against the plaintiff in error.
 40 Ga., 94, 157, 213; 42 Ib., 233.

SPEER, Justice.

(Craig sued Rogers on a promissory note in Milton superior court. The service was by leaving a copy of the writ at the defendant's "residence," in that county. On the trial, defendant moved to dismiss the case for want of proper service. In support of this motion it was admitted that he had a wife and five children living permanently on the old family homestead, in Milton county; that he had not separated from his family, but that since 1879 he had been in the Indian Territory, excepting a few days preceding the trial. The motion was overruled; and this judgment was assigned as error.)

<sup>\*</sup>No opinions or full reports are published in the following cases, under the provisions of the Act of March 2d, 1875.

Heath Dr. The State .- Cauthen Dr. The Barnesville Savings Bank.

#### HEATH vs. THE STATE OF GEORGIA.

- 1. The evidence upholds the verdict.
- 2. A refusal to grant a continuance to obtain evidence which, when obtained, would be immaterial, is no ground for a new trial.
- Though a word in the charge, when taken alone, may be objectionable, yet if when taken with its context it is clear and substantially correct, its use will not necessitate a new trial.

# CRAWFORD, Justice.

(The judge charged that in misdemeanors there are no accessories before the fact as in felonies, but all are equally guilty; and that every person "concerned" in this transaction is equally guilty. Exception was taken to the use of the word "concerned.")

#### CAUTHEN vs. THE BARNESVILLE SAVINGS BANK.

- 1. An affidavit of illegality having been filed by one defendant in f. fa, and an extraordinary motion for new trial having been made by his co-defendant on grounds involving other facts than those set up in the affidavit, there was no error in refusing to submit the two to a jury together.
- 2. Where suit was brought on a promissory note, service perfected, and a judgment rendered by default, an extraordinary motion for new trial at a subsequent term of court would not lie for matters which were known to the defendant, and which, if true, should have been set up as matter of defence to the action.
- 3. Where a defendant delays the collection of a claim by bringing the case to the supreme court, and there is no semblance of merit in the exceptions, this court is bound to presume that the case was brought up for delay only, and to award damages on motion.
- (a.) That counsel advised his client to except, will not protect him against damages on account thereof.

CRAWFORD, Justice.

Hamilton vs. Howard.

#### HAMILTON vs. HOWARD.

- 1. The law defines what constitutes a legal fence; and there is no distinction made as to the different animals which are likely to enter into an inclosure, making the fence of one height for one class and another height for another.
- Neither can the average height of a fence, too low at some points and too high at others, be taken to decide whether it meets the requirements of law.
- 3. Nor does the fact that a fence not up to the standard fixed by law will keep out other hogs than those of the plaintiff justify a trespass upon his hogs, even where notice has been first given.
- 4. To an action for trespass committed upon stock while on the premises of the defendant, a set-off of damages to the crop done by the stock is not maintainable, where the fence around such crop was not a legal fence.
- Where all the evidence material to a case is not brought up to this court, alleged errors depending upon the evidence cannot be considered.

# CRAWFORD, Justice.

(Howard brought an action against Hamilton, under §1445 of the Code, for a trespass in killing one of plaintiff's hogs in an enclosure belonging to defendant. The latter pleaded the general issue and also the following special pleas: That the fence, though not a legal fence generally, was sufficient as to hogs (describing it); that though the fence was not five feet high it was nowhere lower than four and a half feet, and in some places was seven feet high; that the fence had been sufficient to keep out other hogs; that he gave plaintiff notice before killing the hog; and that he claimed a set-off for damages done to his crop by the hog.)

Lawrence vs. The State-Holland vs. Sewell-Coker vs. McKinney.

#### LAWRENCE vs. THE STATE.

- The verdict was a necessary consequence of the evidence in this
  case.
- (a.) Human intent can only be ascertained by acts and conduct; and the law presumes that every act which is in itself unlawful, was criminally intended, until the contrary is made to appear.
- To constitute a principal in the second degree, one must aid and abet the principal in the first degree. To charge that aiding or abetting is sufficient, is error.
- (a.) Under the evidence in this case, the charge does not appear to have injured the defendant.

CRAWFORD, Justice.

#### HOLLAND vs. SEWELL.

The legal questions in this case are controlled by the rulings made when it was here before (61 Ga., 609); there are no errors of law which require a new trial, and the verdict is supported by the evidence.

SPEER, Justice.

#### COKER vs. McKINNEY.

To sustain a verdict for the plaintiff in a case of forcible entry and detainer, some force, or show of force, must be shown. Where one went to an unoccupied house and deposited bed-clothing there, and when notified to leave by a person who had been in possession of the land on which the house stood for several years, replied that he had bought the land and was in possession, and declined to leave, this was not alone such use of force as to sustain a proceeding for forcible entry and detainer.

CRAWFORD, Justice.

Whitley vs. Alston et al. - Marion vs. The State-Johnson vs. Wilson & Co.

#### WHITLEY vs. ALSTON et al.

- 1. Where complaint for land was brought, and a recovery had against tenants in possession, the fact that their landlord, with their knowledge and acquiescence, employed counsel to move for a new trial, which was done in the name of the tenants, does not render the motion that of the landlord, so as to make it illegal.
- 2. The grant of a new trial was right under the facts of this case.

JACKSON, Chief Justice.

#### MARION vs. THE STATE OF GEORGIA.

- 1. The verdict is not contrary to the evidence.
- 2. While it is not best to remark in the presence of the jury that certain evidence may be admitted "for what it is worth," lest the jury may misunderstand the meaning of the court, yet such a remark will not necessitate a new trial.
- 3. The indictment being for assault and battery, and the defence justification on account of opprobrious words, the jury may take into consideration all the circumstances, including the relative size and strength of the parties in determining the question so raised.

CRAWFORD, Justice.

# JOHNSON vs. WILSON & COMPANY.

- The verdict in this case is not supported by the evidence; and this, in connection with the fact that evidence of importance to the defence has been newly discovered, will necessitate a new trial.
- 2. Where a case is carried by appeal from the county court to the superior court, and from the judgment there a writ of error is taken by the appellant, the security on the appeal is not a necessary party in this court.

CRAWFORD, Justice.

Vinton & Davis vs. Lindsey, executor-Tift vs. Harrell-Clark vs. The State.

#### VINTON & DAVIS vs. LINDSEY, executor.

1. Arbitrators are not limited to an adjournment from day to day, but may adjourn for a longer time if the ends of justice require it. The matter of continuances and adjournments is within the sound discretion of the arbitrators, and the record in this case fails to show any abuse of that discretion to the injury of the excepting party.

2. No reasonable ground of exception appearing in this case, damages are awarded against the plaintiffs in error.

SPEER, Justice.

#### TIFT vs. HARRELL.

The title to land being in controversy and the evidence concerning it conflicting, one of the claimants filed his bill to enjoin the other from using the pine trees on the land for the manufacture of turpentine. It appeared that this use, while injurious to the timber, did not destroy the corpus of the estate. The evidence on the question of solvency was conflicting. The chancellor granted the injunction, but provided that it should be dissolved upon defendant's giving bond to answer any verdict for damages which complainant might recover against him:

Held, that there was no error in granting such conditional dissolution.

JACKSON, Chief Justice.

#### CLARK vs. THE STATE OF GEORGIA.

- The evidence in this case was amply sufficient to warrant the verdict.
- The charge of the court covered the substantial issues in the case, and in the absence of any request to charge, the defendant cannot complain that his theory of the case was not fully given.

JACKSON, Chief Justice.

SPEER, Justice, dissenting.

Rountree vs. Gurr-Bryant vs. Welch, Cook & Bacon-Patterson vs. The State.

#### ROUNTREE vs. GURR.

- 1. The charge as a whole is a fair exposition of the law of this case.
- An exception to the manner or tone of voice of the court in delivering his charge is not reviewable by this court, there being no way by which it can be reflected here or its influence estimated.
- (a.) It is not always necessary that the court should charge an equal amount on the theory of each side. Frequently one position may require more elucidation than another.

SPEER, Justice.

#### BRYANT vs. WELCH, COOK & BACON.

After all matters in issue between the parties to an equity cause had been submitted to an auditor, a report had been made and exceptions filed and overruled, one of the parties could not then amend his pleadings and carry the case to a jury on its merits. Code. §4206; 59 Ga., 48.

CRAWFORD, Justice.

#### PATTERSON vs. THE STATE OF GEORGIA.

- 1. Though there be no certificate of the clerk on the bill of exceptions yet if the certificate to the transcript of the record states that the true original bill of exceptions is enclosed within, and the papers come enclosed in the same envelope, the writ of error will not be dismissed. 40 Ga., 702.
- 2. Where counsel for one side invoked the ruling of the court to stop opposing counsel in argument, on the ground that there was no testimony to authorize his comments, there was no error in the court's deciding the comments in order according to his recollection of what one of the witnesses said, at the same time remarking that he did not intend to express or intimate any opinion as to the evidence, but left that to the jury. 43 Ga., 368.
- 3. The verdict is upheld by the evidence.

JACKSON, Chief Justice.



Johns vs. The State-Ferst & Co. vs. Larkin-The Georgia Railroad vs. Beatle et al.; etc.

#### JOHNS vs. THE STATE OF GEORGIA.

The act of 1879 (page 132) regulating practice in the county courts applied as well to courts having criminal jurisdiction only as to those which combined civil and criminal jurisdiction. Hence, since its passage, indictment may be demanded by a defendant in a criminal case in any county court.

CRAWFORD, Justice.

#### FERST & CO. vs. LARKIN.

A debtor delivered to a creditor notes falling due respectively in one, two, three and four years after date, and to secure them in part gave to the creditor a lease of certain land for ninety-nine years, taking in return a bond to retransfer the leasehold to her, provided that she should within four years pay to the creditor a specified amount:

Held, that a failure to pay one of the notes would not give the creditor the right to bring ejectment; such right would not accrue until the lapse of four years with failure to pay.

SPEER, Justice.

#### THE GEORGIA RAILROAD vs. BEATIE et al.

- The legal principles involved in this case were settled by the decision therein at the February term, 1881, of this court.
- Mere exceptions for delay only not being made to appear from this record, damages for frivolous exceptions are denied.

SPEER, Justice.

#### PERRY vs. BRAY & KEEL.

B. & K. executed a written instrument, by which they promised to pay to D. or order \$125.00, on or before the first of November following; they also gave a lien on their crops for the current year, and from year to year until paid, it being recited that the note was

Maddox et al. vs. The State-Gardner vs. Waters et al.

given for advances made by D., and promised to deliver to D. sufficient cotton from their first picking to pay said amount, empowering him to foreclose summarily in case of non-payment. D. wrote his name across the face of the instrument, and P. received it for value before due:

Held, that in law D's. signature was an indorsement, and therefore delivery of cotton to him after P. received the note was not payment thereof. Nor could this written contract be varied by parol so as to make D's signature an acceptance only.

JACKSON, Chief Justice.

#### MADDOX et al. vs. THE STATE OF GEORGIA.

The reopening of a case after both sides have announced closed, is a matter for the discretion of the court, and his decision will not be reversed unless decided injustice has been done thereby.

(a.) The discharge of all the witnesses on one side, after a case has been announced closed, is a good ground for refusing to reopen the case at the instance of the other party.

CRAWFORD, Justice.

#### GARDNER vs. WATERS et al.

A bill alleged, in brief, as follows: Complainant, being aged and infirm, was entitled to a homestead; he had fifty acres of farm lands set apart to him under §2040 of the Code: the land was somewhat encumbered, but was worth \$3,000.00 over and above liens; the sheriff levied a justice court f. fa. on the property, and sold the same to defendant for \$65.00. Complainant was absent from the county, and knew nothing of the levy; no notice thereof was served of which he knew any thing; complainant's attorney made a claim affidavit, and presented it to the sheriff, but it was refused; he then gave notice of the homestead, and defendant bought with full knowledge; the debt was not one which bound the homestead: the levy was excessive; complainant had sufficient personalty to pay the debt; he has tendered to the purchaser the amount paid for the land, which the latter refused to receive. Complainant is old and is about to be turned out of his home. The prayer was for injunction, cancellation of sheriff's deed, etc. The answer set

Kennedy, administrator, vs. Redwine-Purdy vs. The State.

up that complainant was never entitled to a homestead, that it was illegal, that there were incumbrances on the land, and that defendant bought bona fide for value. The chancellor ordered that the injunction be granted upon complainant's giving bond to pay the \$65.00; but that it might be dissolved by the defendant's giving bond to pay complainant all damages he might sustain from possession or occupancy by defendant:

Held, that the chancellor did not abuse his discretion in granting such order.

SPEER, Justice.

#### KENNEDY, administrator, vs. REDWINE.

- 1. The verdict in this case is supported by the evidence.
- 2. A defendant in f. fa., as a witness for plaintiff in the trial of a claim case arising under levy of the fi. fa., having testified that the property was given in for taxation by claimant as partnership property of himself and defendant prior to a transfer of it to claimant, there was no error in allowing the claimant to introduce the tax digest to show that the property was in fact given in by him as his own.

CRAWFORD, Justice.

# PURDY vs. THE STATE OF GEORGIA.

Under a general power to control the manufacture and sale of spirituous liquors granted by the charter of a municipal corporation, an ordinance was passed requiring the closing of doors of retailers on Sunday and every night at 12 o'clock except Saturday night, then at 11 o'clock, and that the keepers should not permit persons to assemble at their places of business on Sundays, or after the hours at which they were required to close their doors. A retailer was convicted in the mayor's court for permitting persons to assemble at his saloon or grocery on Sunday:

Held, that this was no bar to a subsequent prosecution by the state for keeping open a tippling house on Sunday. 35 Ga., 145; 53 Ib., 75; 59 Ib., 168.

SPEER, Justice.

Wood vs. The State-Porter vs. Massengale Brothers; etc.

#### WOOD vs. THE STATE OF GEORGIA.

- I. Exception to the entire charge on the ground that it is "on some material points contrary to law and failed to charge the law applicable to the facts, and was calculated to mislead the jury," is too vague and general.
- Where long paragraphs of a charge involving a number of propositions of law are excepted to without pointing out the specific errors therein, the exception is too general, and cannot be considered.
- 3. The verdict is amply supported by the evidence.

SPEER, Justice.

#### PORTER 7'S. MASSENGALE BROTHERS.

P. was the agent at Augusta, Ga., of M. & Bros., who lived at St. Louis, Mo., and was to receive a commission on sales. They dealt in futures. On November 13th, 1879, he telegraphed to them to buy 30,000 bushels of wheat, December delivery, for "Roberts," and to draw on him (P.) for margins. In fact there was no such person as "Roberts," and he was dealing for himself. On November 15th he ordered the contract or "deal" closed at a profit. On November 17th a draft for \$1,000.00 margins drawn on the 13th, was presented to him, and payment refused:

Held, that such transaction was a mere speculation on chances and illegal. In a suit for the profits and commission on such a transaction by P., a non-suit was properly awarded. Code, §2638.

SPEER, Justice.

#### THE DAHLONEGA GOLD MINING COMPANY vs. PURDY.

- I. Where a judgment of the superior court has been affirmed by this court, its legality becomes res adjudicata, and it cannot be attacked by affidavit of illegality for errors which were or could have been excepted to in the bill of exceptions.
- 2. No sufficient legal reason for excepting appearing in this case, ten per cent. damages are awarded against plaintiff in error.

CRAWFORD, Justice.



Tarver & Brother vs. Plant & Son-Zachry vs. Brown et al.; etc.

#### TARVER & BROTHER vs. PLANT & SON.

The judgment of the court below being unquestionably right, and no reasonable ground for excepting appearing, in the absence of any appearance for plaintiff in error, on motion of counsel for defendant in error, the record will be opened and damages awarded for bringing the case to this court for delay only.

SPEER, Justice.

#### ZACHRY vs. BROWN et al.

There being no shadow of merit in the grounds of illegality in this case, nor in the exception to its being overruled, ten per cent. damages are awarded against the plaintiff in error.

SPEER, Justice.

# NORFLEET & JORDAN vs. CLARY.

- 1. The evidence is unsatisfactorily sent up in this case, but from the record before us we are not satisfied with the trial below.
- The evidence for the plaintiff in this case is not sufficiently explicit to sustain the finding.

CRAWFORD, Justice.

#### CHAPMAN vs. HAND et al.

- 1. A non-suit should have been granted in this case.
- 2. The verdict is not supported by the evidence.

CRAWFORD, Justice.

Thomas vs. Thomas-Coker vs. The State-Hanie vs. The State.; etc.

THOMAS vs. THOMAS; COKER vs. THE STATE OF GEOR-GIA; HANIE vs. THE STATE OF GEORGIA.

The verdict in each of these cases was not contrary to law or evidence.

# COBB vs. PEEPLES.

The presiding judge did not err in granting a first new trial in this case.

TRAMMELL et al. vs. MARKS et al.; SEWELL vs. ED-MONDSTON.

The court did not err in refusing an injunction in each of these cases.

# CASES ARGUED AND DETERMINED

# Supreme Court of Ceorgia,

#### AT ATLANTA.

#### FEBRUARY TERM, 1882.

PRESENT—JAMES JACKSON, . . . . . CHIEF JUSTICE.

MARTIN J. CRAWFORD, . . ASSOCIATE "

ALEXANDER M. SPEER. . . " "

# THE WESTERN UNION TELEGRAPH COMPANY vs. Blan-CHARD, WILLIAMS & COMPANY.

- I. When a telegraph company for a compensation receives a message for transmission over its wires, it is bound to perform its contract with that integrity, skill and diligence which appertain to its particular business; and if by reason of the want of any of these qualities the message be improperly transmitted and injury accrues to the sender, the company will be liable to him for damages.
- (a.) This is true whether the telegraph company be considered as a bailee for hire, a common carrier, or merely as one employed to do certain work. 58 Ga. 433.
- 2. Any rule of the company which seeks to relieve it from performing the duty belonging to its employment with integrity, skill and diligence is contrary to public policy. If, therefore, it is necessary for the company, in transmitting messages with integrity, skill and diligence, to have them repeated, the duty of so doing devolves upon it, not upon the sender.
- (a.) The charge for transmitting messages in this state is fixed by the company, not by law.
- A telegraph company cannot by any rule or regulation of its own protect itself against damages resulting from every degree of negligence except gross negligence or fraud.



#### SUPREME COURT OF GEORGIA.

The Western Union Telegraph Company vs. Blanchard, Williams & Co.

- (a.) Nor can it by such rule or regulation limit the damages to be recovered to a return of the amount of toll paid out for sending the message.
- 4. Where a rule of a foreign telegraph company doing business in Georgia required persons damaged by failure to properly transmit messages to present their claim for damages within sixty days thereafter to some agent of the company, authorized to exercise its corporate powers in relation to the subject matter of the claim, a presentation of such a claim to the resident agents who made the contract and transmitted the message was sufficient.
- 5. A message in these terms: "Cover two hundred September and one hundred August," was shown to be in the ordinary expressions used in the cotton trade, meaning that the person receiving the message should sell for the sender two hundred bales of cotton deliverable in August and one hundred deliverable in September:
- Held, that it was not such an obscure message as would limit the usual liability of the company or furnish the basis for a charge that a hidden meaning of the sender not discoverable by the company would not be a ground of its liability.
- (a.) There was at least enough on the face of the message to show the company that it was a commercial message of value, and that is sufficient to render the company liable for negligence or improper transmission.
- 6. Although a speculation in cotton futures may be an illegal contract, yet an agent who incurs expense or loss on behalf of his principal in carrying out such contract may recover the amount thereof from such principal. If such loss or expense was caused by the improper transmission of a telegram from the principal to the agent, the former on paying the loss to the agent would have sustained a damage through the negligence of the telegraph company for which he could recover from it.
- (a.) The illegality of the speculation would not relieve the company from damages resulting from its negligence in transmitting a telegram according to its contract for a valuable consideration.

Telegraph Companies. Damages. Negligence. Contracts. Cotton Futures. Before Judge WILLIS. Muscogee Superior Court. November Term, 1881.

To the facts reported in the decision, it is only necessary to add that the defendant moved for a new trial on the following, among other grounds:

(1.) Because the court refused to charge the jury that

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telegraph companies may limit the measure of their liability to damages by reasonable rules and regulations brought home to the knowledge of, and attended to, by those with whom they deal, and that a rule of a telegraph company requiring important messages to be repeated in order to guard against mistakes in transmitting them, and charging one-half the usual rate for such repetition, and that the company will not be responsible for mistakes in the transmission of unrepeated messages is reasonable, and such as the company may adopt; and it will not be liable for an error in an unrepeated message except for fraud or gross negligence.

- (2.) Because the court refused to charge the jury that the rule in regard to insuring important messages by contract in writing, as contained in the said printed blank of said defendant, is also a reasonable one, and in the absence of such insurance the company is only liable for fraud or gross negligence.
- (3.) Because the court refused to charge the jury that if the testimony shows that the message which plaintiffs allege was delivered by them to defendant on the 19th day of May, 1879, for transmission to Waldron & Tainter, New York, was written by said plaintiffs, or any one of them, or any member of their firm, on a printed blank of defendant in the words and figures following:

#### "THE WESTERN UNION TELEGRAPH COMPANY.

All messages taken by this company subject to the following terms: To guard against mistakes or delays, the sender of the message should order it repeated; that is telegraphed back to the originating office for comparison. For this one-half the regular rate is charged in addition. It is agreed between the sender of the following message and the company that said company shall not be liable for mistakes or delays in the transmission or delivery or for non-delivery of any unrepeated message whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery or for non-delivery of any repeated message beyond fifty times the sum received for sending the same, unless specially insured; nor in any case for delay arising from unavoidable interruption

in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of messages to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon at the following rates, in addition to the usual charge for repeated messages, viz: one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employé of the company is authorized to vary the foregoing.

No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices. and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender. Messages will be delivered free within the established free delivery limits of the terminal office; for delivery at a greater distance a special charge will be made to cover the cost of such delivery. The company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message.

A. R. BROWN, Secretary,

NORVIN GREEN, President."

"COLUMBUS, GA., May 19th, 1879.

Send the following message, subject to the above terms, which are agreed to.

To Waldron & Tainter, 97 Pearl st., New York.

Cover two hundred September, one hundred August.

(Signed) BLANCHARD, WILLIAMS & CO."

[Paid.]

"Read the notice and agreement at the top,"

and that said plaintiffs assented to said rules and regulations, then the said rules and regulations became and were the agreement and contract between the said parties, and said plaintiffs can not recover, unless they show that they had said message repeated or requested to have it repeated, and paid or offered to pay for the same, any greater sum than the tolls paid by them with the legal interest thereon.

(4.) Because the court refused to charge the jury as follows: That if the jury shall believe from the testimony that the message sent by plaintiffs in this case, or delivered to defendant to be sent, was an obscure or unintelligible message, and that its meaning was unknown to

defendant or its agents, and that there was no notice or information of any fact given to defendant or contained in the message itself indicating its importance, or that special damages would result from any neglect in its transmission, then the measure of damages would be, in case of recovery, the tolls paid by plaintiffs for its transmission, and the jury should so find.

(5.) Because the court refused to charge the jury as follows: Telegraph companies are not liable for damages in any case where the claim for the same is not presented in writing within sixty days after the sending of the message, when such stipulation or condition is embodied in the printed terms of the blank upon which the message is sent, to some agent of the company authorized to exercise any of its corporate powers in relation to the subject matter of the claim. And if the evidence does not show that plaintiffs presented their claim in writing within such time to such agent of the defendant, then plaintiffs cannot recover in this case.

JNO. S. BIGBY, for plaintiff in error.

PEABODY & BRANNON, for defendants.

SPEER, Justice.

Blanchard, Williams & Co. sued the Western Union Telegraph Company in an action of assumpsit for the sum of \$189.71 as damages claimed to have been sustained in consequence of an error in the transmission of a day message from the city of Columbus to the city of New York.

The declaration alleges that on the 19th of May, 1879, the plaintiff below caused to be delivered to the defendant a message in writing as follows:

"Waldron & Tainter, New York.

Cover two hundred September, one hundred August.
(Signed) BLANCHARD, WILLIAMS & CO.,"

to be sent and delivered to Waldron & Tainter, New York, and the defendant for a certain consideration agreed to do it. That the company did not transmit the message as received, but changed it so that when delivered to Waldron & Tainter, in New York, it read as follows:

" To Waldron & Tainter, New York.

Cover two hundred September, two hundred August.
(Signed) BLANCHARD, WILLIAMS & CO."

The declaration alleged that Waldron & Tainter were at that time factors and commission merchants in New York, engaged in buying and selling cotton, and then held for plaintiffs 100 bales of cotton, to be delivered to their order in August, 1879, in New York, and that plaintiffs, desiring to sell said 100 bales, delivered said message to defendant, to be carried to New York to be delivered to said Waldron & Tainter. Plaintiffs aver that the message was an order from them to Waldron & Tainter to sell said 100 bales of cotton on their account, to be delivered in New York in August, 1879, and would have been so understood if it had been delivered to them as written and delivered to the telegraph company.

That the message, as sent by defendant, was an order to sell 200 bales, to be delivered in New York in the month of August, and was so understood by Waldron & Tainter; and in consequence of the change of the message they sold 200 bales of cotton on account of plaintiffs, to be delivered in New York in the month of August, instead of 100 bales as directed by the message delivered by plaintiffs. By reason of this change Blanchard, Williams & Co. were compelled to buy 100 bales to comply with the sale made by Waldron & Tainter.

That on the 20th of May, 1879, they advised Waldron & Tainter of the change in the message, and they on the 21st of May bought 100 bales of cotton to comply with said sale made; but in consequence of the fact that cotton had advanced, a loss was incurred by plaintiffs of \$159.67,

and they were also put to the expense of \$25.00 in selling and buying said 100 bales, and \$5.00 in sending messages by telegraph to New York in connection therewith.

To this suit defendants filed the pleas,

- (1.) Of the general issue.
- (2.) That the plaintiffs at the time of sending said message made no request to have said message repeated, did not offer or pay to have said message repeated, but paid for it as a single message under the rules and regulations of the company, which were known to plaintiffs and assented to by them.
- (3.) That the message of plaintiffs was an obscure or cipher message, and plaintiffs did not at the time of its transmission inform the defendant of the value or importance of the message. That the plaintiffs well knew of the rules and regulations of the company as to sending obscure or cipher messages, and the same was sent under said rules, etc., and defendant, under said rules, was not liable, and they were sent at risk of plaintiffs.
- (4.) That plaintiffs did not communicate to defendants at the time of the transmission of said message, the special circumstances under which it was sent, nor were they known to defendant—that the message was of any value or importance.
- (5.) That the contract in respect to which said message was sent was an illegal contract under the law, being a contract touching the sale of cotton futures.

Under the evidence and charge of the court the jury returned a verdict for the plaintiffs, whereupon the defendants made a motion for a new trial on various grounds as set forth in the record, which was overruled by the court and defendant excepted.

It appears from the evidence in this case that the plaintiffs below delivered to the telegraph company at Columbus (the defendant) a message to be transmitted and delivered to Waldron & Tainter, factors and commission merchants, engaged in the buying and selling of cotton

in the city of New York. That in said message, as delivered by plaintiffs to the company, the said factors were instructed to "cover two hundred September and one hundred August." But the message received by the factors was to "cover two hundred September and two hundred August."

The message as received in New York by the factors, according to universal commercial usage among cotton men, meant the plaintiffs desired their factors to sell on their account two hundred bales of cotton to be delivered in August, and two hundred bales to be delivered in September. Whereas, the message as delivered for transmission to the company at Columbus, meant for the factors to sell two hundred bales to be delivered in September and one hundred to be delivered in August on account of plaintiffs. The evidence further shows that the words used in the telegram are terms of trade in ordinary use, and having the same import universally in trade. They meant a direction to sell, and implied that the plaintiffs were long of cotton to be delivered to them at such times.

In transmitting the message it further appears that the message passed as delivered correctly over the wires from Columbus to Washington city. That at that point it was received in the words as written and delivered in Columbus, but that at Washington city the telegram was changed, the word two was substituted by the operator for the word one in the August delivery. Austin, a witness for the defendant and the telegraph operator at Washington city who transmitted the message to New York, says: "If the printed copy at New York differs from the manuscript copy handled by me at Washington, the presumption is the error was made by me, as being received upon the printing instrument at New York, it is bound to record exactly as transmitted, though I am unable to explain it, save by the operation of unconscious mental action."

It is clear then, the error was not the result of any

"atmospheric agency," but inattention and negligence in the operator at Washington, which he, in mild terms, calls "the operation of unconscious mental action." And it is against the operation of this unconscious mental action, that the law gives redress when loss results therefrom.

That the damage claimed resulted to the plaintiffs by reason of this error is fully sustained by the proof, and not controverted; though plaintiffs diligently sought by telegrams to rectify the error and guard against its consequences as soon as discovered, but without avail.

The fact of negligence against the company and loss to the plaintiffs being thus established by the evidence, was the law of the case correctly submitted to the jury by the court, or were the defences set up by the defendant under the rules and regulations established by the company in the transmission of messages, such as would, under the law and evidence, protect them from liability?

I, 2, 3. In the case of the Western Union Telegraph Company vs. Fontaine, 58 Ga., 433, this court held: "Where a message is delivered to a telegraph company, it occupies the legal status of a bailee for hire, and not that of a common carrier, and if such message be not sent as directed, such company is liable for the damages resulting therefrom, unless it shows that the diligence necessary and appropriate to that peculiar business has been exercised." It was also held that, "An agreement that the company shall not be liable for errors or delays in the transmission or delivery or for non-delivery of such messages, from whatever cause occurring, shall not relieve it from liability from the damages resulting from its failure to transmit a message by reason of its own gross negligence. Such a contract the law does not recognize."

Chief Justice Warner, in pronouncing the opinion of the court, said: "When a person either natural or artificial undertakes any employment, trust or duty, such person contracts with those who employ or entrust him or it to

perform the employment, trust or duty with that integrity, diligence and skill which belongs or appertains to that particular employment, and if by the want of either of these qualities any injury occurs to those who employ him or it for reward, an action on the case may be maintained therefor." He places the liability of the company on the ground that he is a bailee for hire, and though they are not insurers against loss or damage to the thing bailed, they are required to exercise care and diligence in protecting or keeping safely the thing bailed."

Here the plaintiffs proved that the message that he entrusted to be transmitted and delivered was not in fact delivered, but an altered and changed message which resulted in loss to the plaintiffs; and after such proof under the law, "the burthen was on the bailee to show proper diligence." Code, §2064. And when he undertook to do this, its own agent, employé and witness shows the error was his own and the result "of the operation of unconscious mental action."

In the same case, Judge Bleckley, while not concurring that the liability of the company was that of a bailee for hire, still held that the company could not stipulate against liability for its own gross negligence. "In no business carried on for reward can that be done."

Judge Jackson concurring, "was inclined to think that the business of a telegraph company is very similar to that of a common carrier," and approximates very nearly to that business, and his reasoning upon the proposition is cogent and difficult to answer, if not conclusive.

In looking into the charge of the court, he clearly has submitted the rule of liability as thus recognized and established by this court, and we think the charge was pertinent, clear and applicable to the facts of the case.

It is insisted, however, by way of defence that, as the plaintiffs made no request or payment to have the message sent "repeated," and as under the evidence and rules of the company absolute accuracy in the transmission of mes-

sages can only be secured by "repeating" them, the plaintiffs were notified by the printed rules of this necessity, and hence defendants are not liable, since they did not repeat the message. We can only say, that any rule or regulation of the company which seeks to relieve it from performing its duty belonging to the employment with integrity, skill and diligence, contravenes public policy as well as the law, and under it the party at fault cannot seek refuge. If it become necessary for the company in transmitting messages with integrity, skill and diligence, to secure accuracy, to have said messages repeated, then the law devolves upon them that duty, to meet its requirements. We know of no law in this state that limits their tolls on messages; this is under their own control. A message must be transmitted with integrity, skill and diligence, and the mode of attaining accuracy in such work they have at their command,—the compensation paid therefor the law does not seek to limit or restrict. 28 Ga., 543; 58 Ib., 433; 34 Ib, 215; 1 Daly Tel. Cases, 288; 29 Maryland, 222; 27 Iowa, 432; 60 Maine, 530.

In the case in 27 Iowa, 432, the court on full review of the authorities, held "that a telegraph company cannot by any rule or regulation it may make, relieve itself from mistakes caused by the want of ordinary care. Hence, they would be liable for ordinary as well as gross neglect." In the request to charge made by plaintiff in error, the refusal of which is complained of in the first and second grounds of the motion, the charge asked for, by implication at least, seeks a protection for the company under its rules and regulations, which is not sanctioned by law.

Neither do we think the company, by any rule or regulation of its own, can protect itself against every degree of negligence, except "gross negligence or fraud," as is claimed in the written request to charge, and assigned as error for the refusal thereof, in the third ground of the motion. Nor is the effort to fix by rule or regulation the amount of damages the company may be liable for in

harmony with the law, where liability is incurred. 60 Maine, 530. To say the company shall only be liable for the amount of tolls paid out, is practically to excuse them altogether.

- 4. In the refusal to charge, as asked for in the sixth ground of the motion, "as to plaintiffs presenting their claim for damages within sixty days to some agent of the company authorized to exercise its corporate powers in relation to the subject matter of the claim," it appears that the defendant is a foreign corporation, and we think a presentation of this claim for damages within sixty days, as shown by the evidence, to the resident agents of the defendant at Columbus, who made this contract and transmitted the message, is sufficient compliance with the law and rule, and that was all that was required.
- 5. As to the fifth ground in the request to charge, we do not see but what the message sought to be transmitted was, according to the proof, an ordinary commercial message, intelligible to those engaged in cotton dealing; and we can see no such special purpose intended by the sender, which was unknown to the company, as to vary the rule of liability. There was at least enough known to show it was a commercial message of value attached to the message, and that is sufficient. 55 Penn. State Rep., 262; Tel. Cases, 256; 1 Daly, 474; 44 N. Y., 263; Tel. Cases, 570; 41 N. Y., 544; 45 Ib., 744; 44 Ib., 263; Tel. Cases, 613. Moreover the same obscure word "cover" here used seems to have been known to defendant in the case in 58 Ga., 433, against the same company, when no such defence was then set up as to its being obscure.
- 6. The seventh and eighth grounds of the motion, complained of the refusal of the court to charge, "that if this was a sale of cotton by Waldron & Tainter, for plaintiffs, to be delivered at a future day, then it was a speculation in chances, the contract was illegal, and no recovery can be had;" and on the other hand, charging

that "though this might be so, the defendant in this case could take nothing by it, that they were bound by their contract with plaintiff without reference to it."

Granting the contract of selling futures in cotton is contrary to our law, if the same was to be here performed, still the agents in New York who bought and sold the cotton, (and presumably were bound for it) could recover of the plaintiffs the amount of the loss for them they had paid. If so, on the plaintiffs paying this loss, they have sustained a legal injury, and the telegraph company who caused the injury are liable for it. The sending of the message was a legal act. Plaintiffs were bound to pay in law the toll on the same, and if so, when the company takes its benefits, why may it not be held liable for negligence in the performance of it? 48 Ga., 102; 45 Ib., 501.

In looking through the other grounds of the motion, we see no such error as, in our opinion, calls for a reversal of the judgment.

Judgment affirmed.

# THE SOUTHWESTERN RAILROAD vs. WRIGHT, COMPTROLLER GENERAL, et al.

[Jackson, Chief Justice, being disqualified, Judge Underwood, of the Rome circuit, was appointed to preside in his place. This case was argued at the last term, and the decision reserved.]

- I. Where any ministerial officer of this state is attempting to collect money out of a person, natural or artificial, under the forms of law, but without any valid law to authorize the process he uses and calls an execution for taxes, it is the duty of the courts, in a proper case made, to arrest the proceeding in some of the modes known to the law, and afford relief to the party justly complaining.
- 2. Equity has jurisdiction to interfere in behalf of any person, natural or artificial, entitled to relief on the following grounds: (1.) Where exactions are pressed in the form of annual taxes, inconsistent with, and violative of, legal rights. (2.) Because the exactions might be repeated and wrongs multiplied. (3.) When misled by the act of

the officer, which amounts to a legal fraud. (4.) On the ground of mistake. (5.) Because the numerous questions made as to differ ent parts of the property assessed, and the liability of each portion dependent for adjudication on separate charters and amendment and other questions in respect to other items of property in an out of this state, and in what degree or how connected, and whether liable or not to be taxed, make a complicated case the property calls for the exercise of the powers of a court of equit to ascertain, adjust and settle.

3. Tax executions having been issued against the railroad and levie upon property in Bibb county, the principal office of the compan being in that county, the superior court thereof has jurisdiction t enjoin the collection of the fi. fas. The case is not altered by the lease to another company.

4. Under the facts of the case, it is apparent that the collection of ta upon the entire property of the railroad, without regard to the limitations of the charter, would be unconstitutional and illegal.

5. That portion of the new Southwestern railroad, known as the former Muscogee railroad, from Columbus to Butler, is not liable to be taxed beyond the limitation fixed in the charter, it being covere by the decision of the supreme court of the United States. 92 U.S. 665. The road from Fort Valley to Butler is not liable to be taxed further than provided in the charter, because the words at thorizing the extension to Butler or Wolf Pen, as then called, exore erate the extension from further taxation—or taxation "of one-har of one per cent, on the net annual income."

The main line of road from Macon to Fort Gaines is exempt from taxation, except as limited in the charter.

The line from Cuthbert to Eufaula is subject to the ad valorem tax less the amount already paid.

The line from Albany to Arlington is liable to the ad valorem tax, de ducting the income tax paid, it being made expressly liable for "suc additional tax as the legislature may hereafter impose." We thin the act of 1874 imposed the ad valorem tax.

6. If there is any other question in this case not mentioned, it is full covered by the decision in this very case, in 64 Ga., 783, and the decision is in all things affirmed, and must control this case.

 A decision made in a particular case must control the case. The principle might be reviewed in another case and reversed.

Equity. Taxes. Railroads. Southwestern Railroad Judgments. Res Adjudicata. Before Judge SIMMONS. Bibb Superior Court. April Term, 1881.

To the report contained in the decision it is unnecessary to add any thing further than to refer to the same case reported in 64 Ga., 783, where it is fully set forth.

A. R. LAWTON; LYON & GRESHAM, for plaintiff in error.

CLIFFORD ANDERSON, attorney general; ROBERT TOOMBS, for defendants.

UNDERWOOD, Judge.

This case comes before the court a second time. The principles involved are of very great importance to the parties litigant. Exceedingly complex questions and great interests are involved, both to the state and the corporation. The decision in this particular case will control in all similar cases. It is due to the state and the corporation and other parties, that a rest should exist in reference to the right and exceptions claimed. We have given the case such consideration as the time allowed us will permit, and the result aimed at will be announced as concisely and as clearly as has been attainable.

The plaintiff in error filed a bill on the equity side of the court of the county of Bibb, claiming relief from the payment of two executions issued by the Comptroller-General of Georgia vs. The Southwestern Railroad Company for taxes claimed by the state, alleged to be due and unpaid,—taxes alleged to be assessed upon the property of defendant its road and branches. The bill prayed for an injunction. The defendant answered the bill. The chancellor granted the injunction prayed for, and the defendant excepted. The decision of the court below was affirmed with instructions. The case is reported in 64 Ga., 783.

After that decision, the case proceeded in the superior court of the county of Bibb. An auditor was appointed. He heard the case and made a report, to which exceptions

were filed by both parties. The case was tried under the instructions upon the exceptions filed to the auditor's report, and the written and verbal proofs. A verdict was rendered. Complainants moved for a new trial, insisting upon twelve grounds. New trial refused, and complainants excepted and assigned error upon each ground in the motion.

1. The first ground for new trial was as follows: "That the verdict of the jury finding the value of the branch railroad from Americus to Albany for the years 1876 and 1877, respectively, to be \$693,500 00 was contrary to the evidence, without evidence, and it was also against the law."

There was evidence in the record that would authorize the jury to find that amount. It was in proof that this part of the road, this branch, was of average value, relatively considered with reference to the value of the whole line of road. It was competent to prove the value of the whole line; to prove the amount of business done on this section and on the whole line, the value of the stock, the productions, population, and resources. These facts, if in evidence, may each and all or any of them be considered by a jury in order to ascertain the market value of the road. This part of the verdict was not against law. We think that by the express language used in the amendatory act of December 19th, 1859, by which the railroad known as the Georgia and Florida Railroad, was consolidated with the Southwestern Railroad Company, it then being completed from Albany to Americus, to-wit: "That the said railroad from Americus to Albany shall be considered part and parcel of the road of the Southwestern Railroad Company, and be liable to pay to the state the same tax that the rest of the Southwestern Railroad Company is liable to pay, and such additional tax as the legislature may hereafter impose," that branch is placed under the same burthen of taxation as the citizens of the state, who were owners of property after the pas-

sage of the tax act of 1874—the ad valorem tax—less any amount of tax paid on that branch prior to the issuing of the fi. fa. See acts of 1874, p. 107, sections 1, 2. Such was the decision of the supreme court in this very case. 64 Ga., 798.

2. The second ground for new trial is, "Because the verdict of the jury finding that part of the railroad from the junction at or near Cuthbert to Eufaula, Alabama, to be of the value of \$427,500.00 for the years 1876 and 1877, respectively, and taxable at that sum for each of those years, was without evidence, against evidence, and also against law."

There was proof as to the value of this part of the road that would authorize the finding of the jury, and the verdict was not against law.

We think the words used in the amended act by which this branch was built, to-wit: "Under the same rules and restrictions as they are now authorized to construct said Southwestern Railroad," are not sufficient to exempt that part of the road from Cuthbert to Eufaula from the provisions of the act of 1874—the ad valorem tax; and therefore that branch is liable to the ad valorem tax imposed by law upon the property of the people of this state.

- 3. The third ground for new trial is, "Because the court erred in overruling the third exception of complainant to the auditor's report, and holding that under the law that part of complainant's road and the property thereof from Americus to Albany was not entitled to the charter exemption of any greater tax on said road and its property than one-half of one per cent. on its net annual income." The words used in the amendment "the same rules and restrictions" do not make the exemption claimed, and we find no error in this ruling and decision.
- 4. The fourth ground in the motion is, "Because the court erred in overruling the first exception to the auditor's report, and in ruling thereon that that part of complainant's road from Cuthbert to Eufaula was not entitled

to the charter exemption of any higher tax on the same, on the said property thereof, than one-half of one per cent. on the net annual income." For the reasons already given there was no error in this decision.

5. "Because the court erred in overruling the second exception to the auditor's report, and in holding that the branch road of complainant, from Albany to Arlington, was not entitled to a charter exemption of no greater tax than one-half of one per cent. on its net annual income, and in ruling that it was liable to pay a tax on all its property as the property of the balance of the people of this state."

We think that the section from Albany to Arlington is liable to the *ad valorem* tax, it being expressly "liable for such additional tax as the legislature may impose." The act of 1874, before cited, imposes it.

6. "Because the court erred in overruling the fifth exception to the auditor's report, and in not holding under the law that said tax execution, the assessment of taxes, returns of property and levy of taxes of the same that formed the subject matter of complainant's bill, were illegal, null and void, and issued not only without authority of law but against the law."

It is contended that, inasmuch as a return had been made to the comptroller general of the income tax upon the whole line of the Southwestern Railroad Company, including the branch roads, that the comptroller general had no authority to issue an execution without notice and arbitration. Under the view which we take of the law, the income tax was not the tax to which these branch roads were subject, but to an ad valorem tax, and the law of the Code relied on applies only to cases of undervaluation. If the ad valorem tax was due and owing by the law, and the company made no return of the value, the company was a delinquent tax-payer, and there was authority of law to issue the fi. fa.

It is also contended that the fi. fas. are illegal because

issued by an illegal order. If it was the duty of the comptroller general to issue the fi. fas., no order was necessary. If he refused to do his duty, the executive could compel it. If he failed to do his duty, it was proper to remind him of it by an order. But, be that as it may, it is wholly immaterial; if the property was subject to taxation, and the return of the property ad valorem was not made as the law requires, and the taxes paid, it was the plain duty of the comptroller general to issue the fi. fas. and collect the tax, and whether he proceeded with or without order makes no difference.

When this case was before the court in 64 Ga., this very question was involved; and sustaining the injunction and holding the case in court for a trial, decided the validity of the executions.

- 7. Because the court erred in the charge to the jury in respect to that part of complainant's road from Cuthbert to Eufaula, as follows: "That road or branch is subject to pay taxes on all its property, just as individuals pay on their property." In other words, it has no exemption. We find no error in this. It was a question of law, and correctly decided, and in accordance with the decision of this court in this case. 64 Ga., 783.
- 8. Because the court erred: "In charging the jury on the same subject stated in the 7th ground hereof, as follows: 'I am not sure it is my province to give you a rule in estimating these values (that of the Cuthbert and Eufaula branch and other branches). It is for the jury, at last, to estimate and value this property, and in considering the value of it, you may take into consideration all the testimony in the case. If there is any evidence going to show what the whole road is worth, or the average per mile, then you may consider if it would be proper to include this branch from Cuthbert to Eufaula in an average of the whole road, or whether in the average you consider only the main track; that is a question I leave you to consider, under all the testimony submitted to you. And I

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leave you to consider whether, in determining the value of these branches, you take the whole length of the roads, 307 miles (if that is the length of the whole road), or leave out the branches and consider 257 miles, if that is the correct number. The real question is, what was the real value, the market value of these roads for the years specified, and according to their true value, and as you find, allow or disallow the exception."

There was no error in this part of the charge as against the railroad company, relative to one criterion of the value. The legislature of Georgia, in 1873, expressed their opinion with reference to the valuation of parts of a railway running in this state that has no terminus in Georgia. See acts of of 1873, page 64. This charge seems to be very carefully guarded, and was as favorable to the railroad company as they reasonably ought to have expected.

9. The ninth ground for new trial stands upon a like footing with the eighth, and is disposed of in like manner.

10. Because the court erred in charging the jury as follows: "There is an intimation by the supreme court, when this case was before them, as to a proper mode of valuing this road. I will not restrict you to that; if the testimony shows a better way to value it, the jury are at liberty to adopt it. If it is shown to you by proper testimony that it is the best way to value it, the jury are at liberty to take the best way in valuing any part of the property."

In estimating the value of a railway, any evidence that will aid the jury in arriving at the true market value is free from objection, and is of course entitled to consideration by the jury. Nothing said in the charge restricted the jury or confined their minds to the consideration of any single piece of evidence as to value. There are many elements of value that may be proved and considered by the jury, viz: The cost of the road and equipments; the value of the stock, the business of the line; the produc-

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tions of the country through which it runs; the cities, towns, villages and population, and many other things; the proportion that the length taxed bears to the whole length of the road.

- 11. There was no error in the charge of the court complained of in the 11th ground for new trial.
- 12. Because the court erred in admitting in evidence the testimony of Virgil Powers as to the value of the stock of the Southwestern Railroad Company.

We think the evidence was properly admitted.

One of the questions argued before this court is this: "That the comptroller-general received the returns, assessed the tax, collected the tax assessed, and then issued the executions without notice."

This question is not free from difficulty at first view. In considering it, let it be borne in mind that this case is in a court of equity. The state has been invited or forced into this court by the railroad company. If this court is right now—if the decision of the court delivered by Justice Jackson referred to, in 64 Ga., made while the late lamented Chief Justice Warner was on the bench, in this very case, is right, the railway company made the first illegal and erroneous movement when it made the return of taxes for the whole line of its road, including branches, at one-half of one per cent. on the "net annual income."

It will be noticed that by the rulings of this court in 64 Ga., only the line from Macon to Fort Gaines was entitled to this exemption, to this rate of taxation, "one-half of one per cent upon the net annual income thereof."

The branches, for the reasons given in 64 Ga., were and are subject to the ad valorem tax as other citizens who are owners of property.

The next erroneous movement was made by the comptroller general when executions were issued for an advalorem tax on the "whole line of the road from Macon, including the branches." By the decision of the supreme court of the United States, Vol. 92, the line from Macon

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to Fort Gaines was exempt from taxation, except one-half of one per cent. on the net annual income. This court in this case has decided that the branches of the company are subject to the *ad valorem* tax as other tax payers.

The following principles are enunciated:

- I. Where any ministerial officer of this state is attempting to collect money out of a person, natural or artificial, under the forms of law, but without any valid law to authorize the process he uses and calls an execution for taxes, it is the duty of the courts in a proper case made to arrest the proceeding in some of the modes known to the law and afford relief to the party justly complaining.
- 2. Equity has jurisdiction to interfere in behalf of any person, natural or artificial, entitled to relief, on the following grounds: (1.) Where exactions are pressed in the form of annual taxes, inconsistent with and violative of legal rights. (2.) Because the exactions might be repeated and wrongs multiplied. (3.) When misled by the act • of the officer which amounts to a legal fraud. (4.) On the ground of mistake. (5.) Because the numerous questions made as to different parts of the property assessed, and the liability of each portion, dependent for adjudication on separate charters and amendments, and other questions in respect to other items of property in and out of this state, and in what degree or how connected, and whether liable or not to be taxed, make a complicated case, that properly calls for the exercise of the powers of a court of equity to ascertain, adjust and settle.
  - 3. Tax executions having been issued against the railroad and levied upon property in Bibb county, the principal office of the company being in that county, the superior court thereof has jurisdiction to enjoin the collection of the fi. fas.

The case is not altered by the lease to another company.

4. Under the facts of this case, it is apparent that the collection of tax upon the entire property of the railroad

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without regard to the limitations of charter, would be unconstitutional and illegal.

5. That portion of the new Southwestern Railroad, known as the former Muscogee Railroad, from Columbus to Butler, is not liable to be taxed beyond the limitation fixed in the charter, it being covered by the decision of the supreme court of the United States. 92 U. S., 665. The road from Fort Valley to Butler is not liable to be taxed further than provided in the charter, because the words authorizing the extension to Butler, or Wolf Pen, as then called, exhonorate the extension from further taxation, or taxation "of one-half of one per cent on the net annual income."

The main line of road from Macon to Fort Gaines is exempt from taxation except as limited in the charter.

The line from Cuthbert to Eufaula is subject to the ad valorem tax, less the amount already paid.

The line from Albany to Arlington is liable to the ad valorem tax, deducting the income tax, it being expressly liable for "such additional tax as the legistature may hereafter impose." We think the act of 1874 imposed the ad valorem tax.

- 6. If there is any other question in this case not mentioned, it is fully covered by the decision in this very case in 64 Ga., 783; and that decision is in all things affirmed, and must control this case.
- 7. A decision made in a particular case must control the case. The principle might be reviewed in another case and reversed.

This opinion has been written on the circuit amid many perplexities and very many interruptions, and may have much imperfection.

We make the following judgment: It is considered, ordered and adjudged, that the decision of the court below be in all things affirmed.

Hinton vs. The State.

### HINTON vs. THE STATE OF GEORGIA.

I. An accusation in the city court of Atlanta (in lieu of an indictment) charged that a defendant at a specified time and place did "play and bet for money or other thing of value, at a game of five-up or other game played with cards, contrary to law," etc.:

Held, that the accusation was sufficient. It is not now necessary to allege with whom the gaming took place, nor for what thing of value.

- (a.) Where the accusation charged that the defendant played at a game of five-up or other game played with cards, counsel for the state could not be forced to elect on which game he would base the prosecution.
- 2. A witness may refresh his memory from a written memorandum, and then testify to the facts.
- 3. The evidence supports the verdict.

Criminal Law. Indictment. Evidence. New Trial. Before Judge CLARK. City Court of Atlanta. September Term, 1881.

Hinton was tried on an accusation charging him with gaming. The body of the accusation was as follows: "That the said Jerry Hinton, in said county of Fulton, on the 24th day of July, 1881, did play and bet for money or other thing of value, at a game of five-up or other game played with cards, contrary to law."

Defendant demurred to the accusation because it did not state with whom he was playing, nor the specific game, nor for what specific thing of value. The court overruled the demurrer, and refused to require the state to elect what game it would try defendant for playing.

It is unnecessary to set out the evidence, further than to state that a police officer, who was a witness, fixed the time of the offense as follows: "This offense was committed by the defendant on the 24th of July, 1881, about three o'clock Sunday morning—before daylight. I know it from this memorandum here in my hand. I took it from the docket of the station-house. I don't know

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whether I made the original entry on the said docket at police headquarters. I made and make numerous arrests, and can't carry them all in my head, but I swear from memory of the transaction, refreshed as to date by memorandum. Here is the memorandum: 'State vs. Jerry Hinton. Gaming. 24th of July, 1881. Arresting officers, Couch, Weaver, Russell.'"

The jury found a verdict of guilty. Defendant moved for a new trial on the following grounds:

- (1.) Because the verdict is contrary to law and evidence.
- (2.) Because the court overruled, the demurrer to the accusation.
- (3.) Because the court refused to rule out the testimony as to the time the offense was committed which is set out above, the objection being that it was secondary evidence.

The motion was overruled, and defendant excepted.

- E. A. ANGIER, by brief, for plaintiff in error.
- W. D. ELLIS, solicitor of city court, by brief, for the state.

JACKSON, Chief Justice.

- 1. We think that the court did not err in overruling the demurrer to the accusation. The offense was gaming. It matters not with whom, or what thing of value played for, nor was it necessary to elect on which game of cards the playing was done. Formerly it was necessary to allege with whom, but then the punishment was greater if with a slave, and the ruling was put on that ground. See 13 Ga., 396; 22 Ib., 101.
- 2. There was no error in letting in the evidence. The witness swore from memory but aided it by a memorandum, and had the right to do so.
  - 3. The verdict is sustained by law and evidence. Judgment affirmed.

Roberts vs. Cook, sheriff, et al.

# ROBERTS vs. COOK, sheriff, et al.

- Where a petition for a homestead was signed by the attorney of the applicant, and verified by the affidavit of the latter, it was not void.
   Where a homestead was asked for the benefit of a wife and children.
- Where a homestead was asked for the benefit of a wife and children, a failure to allege the age of the wife did not render the proceeding void.
- 3. A petition which stated that the applicant claimed a homestead as head of a family, and then stated of whom that family consisted (his wife and children), was sufficiently explicit in showing who were the beneficiaries for whom the homestead was asked.
- 4. If the record of a homestead proceeding shows that a non-resident creditor's name and address were returned by the applicant to the ordinary, and in proper time a notice with stamped envelope was delivered to the ordinary for mailing, notice is sufficiently shown. The presumption is that the ordinary did his duty.
- 5. That the return of the surveyor on an application for homestead appeared to be on the day set for the hearing would have been good ground for allowing time to investigate the return, but did not render the proceeding void. Especially not at the instance of one who bought the land at a sheriff's sale, subject to the pending application for homestead.

Homestead. Pleading. Before Judge SIMMONS. Appling Superior Court. October Term, 1881.

Roberts ruled the sheriff to show cause why the latter did not put him in possession of certain land bought by him at a sheriff's sale. The sheriff answered that the property had been set apart to defendant in fi. fa. as a homestead for the benefit of his wife and minor children, that application had been made and was pending at the time of the sale, that notice was given, and the purchaser bought subject to the homestead which had since been granted. The answer was traversed solely on the ground that no legal homestead had been granted.

By consent of counsel, the question was submitted to the judge without a jury.

The application for the homestead was as follows:

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## "STATE OF GEORGIA-Appling county.

To the Honorable Silas A. Crosby, ordinary of said county:

The petition of Christopher C. Leggett, of said county, respectfully showeth that he is the head of a family residing in said county, which family consists of Mrs. Henrietta P. Leggett, his wife, and the following named children (minors) residing with and supported, maintained and educated by him, to-wit: Mary Etta Leggett, aged five years; Nancy Virginia Leggett, aged three years, and Georgia Ann Leggett, aged one year. And your petitioner further shows that as such head of a family he is entitled to an exemption of personalty and setting apart of realty, under the constitution of the state of Georgia, whereupon your petitioner humbly prays your honor, the premises considered, to pass a rule or order requiring the county surveyor of said county to lay off and plat one homestead out of the land heretofore designated and described, and also that your honor will pass such rule or order for the publication of this order as is required by the statute in such cases made and provided. And your petitioner further shows unto your honor that the schedule of personalty hereto annexed contains a full and complete schedule of all his personal property, and also that the annexed list or schedule contains all the real estate or lands that he is seized of, and your petitioner also says that the accompanying list contains a list of the moneys, all his creditors and their post-offices, and your petitioner will ever pray etc.,

(Signed)

J. N. BLITCH,
Attorney for petitioner."

Attached to this was the affidavit of Leggett verifying the statements made in it. The petition was filed December 2d, 1880, and an order was issued the same day to the county surveyor to survey lands of the applicant.

Attached to the application were schedules of personalty, realty and creditors of applicant. The county surveyor made a return, the affidavit attached to which was dated December 27th, 1880. On that day the homestead was granted. Movant in the present rule contended that the homestead was void on the following grounds:

- (1.) That the petition did not state for whose benefit the homestead was sought.
- (2.) That said petition did not state the age of Henrietta B. Leggett, petitioner's wife, and also that said petition was not signed by Christopher C. Leggett, but was signed by J. N. Blitch, attorney for petitioner.

#### Roberts vs Cook, sheriff, et al.

- (3.) That the record of said homestead proceedings did not show that the petitioner had served notice on his creditors residing in the county of Appling; verified by his oath or the oath of his agent.
- (4.) That it did not appear from the record of said homestead proceedings that the surveyor, who laid off and platted the same had made a return to the ordinary five days before the time appointed for the passing upon the application for said exemption—the verification of said return made by the surveyor being on the same day that the homestead was set aside, and there being no entry of filing in office indorsed upon the same.

The court held the homestead good, and discharged the rule; whereupon movant excepted.

ROBERTS & DELACY; HOLTON & SON, for plaintiff in error.

No appearance for defendants.

JACKSON, Chief Justice.

The sheriff was ruled to show cause why he did not put a purchaser at his sale in possession of a tract of land sold by him. The cause shown was that the property had been set apart to the defendant in execution as the head of his family, consisting of a wife and minor children, and that application for the homestead was made and pending during the sale, and notice thereof was given publicly by the sheriff at the time of the sale, and the purchaser bought subject to the right of homestead. answer was traversed by the purchaser, the head of the family was made a party to the rule, and the question of law and fact was submitted to the presiding judge without a jury, to determine the validity of the homestead, which was set apart a few weeks after the sheriff's sale. The judgment of the court is that the homestead is valid, and that the rule be discharged. To this judgment exception is taken and error thereon is assigned.

#### Roberts vs. Cook, sheriff, et al.

- I. The attorney signed the petition for homestead, but the applicant made a written affidavit of the facts therein alleged, and this is one reason insisted on to show the invalidity of the homestead. We think that the court ruled correctly that the fact that the attorney signed it did not render the proceeding void, especially as the applicant made oath of the truth of the petition.
- 2. Nor is it material that the wife's age was not set out in the application. True the act of December 16th, 1878, does require that the ages of the family be set out, but the only material part of the family as to age is the children, not the wife. See act of 1878-9, p. 99.

It is true that the act of 1876 did require the age of the wife eo nomine—supplement to Code, §342; but that is not expressly required in the act of 1878, but only the general words "of the family," and this strengthens our conviction that for no conceivable reason is the wife's age important—certainly not so much as to vitiate the entire proceeding. The wife's homestead right is not dependent on age at the time set apart, nor as regards the duration of the homestead estate. The children's age might be important in both respects.

- 3. The petition does state substantially for whose benefit the applicant claims homestead, inasmuch as he shows that he claims it as the head of the family, and gives their names, and states one to be his wife and the others his children.
- 4. It does appear that this purchaser had notice of the application for homestead when he bid off the land, and bought it subject to the notice, and that the plaintiff in execution was returned by the applicant to the ordinary, with his post-office, etc., in compliance with section 343 of supplement to Code, and the presumption is that the ordinary did his duty and mailed the notice. These notices bind this purchaser.
- 5. Whilst the fact that the surveyor's return was apparently made on the day of the grant of the homestead,

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and might have suspended the case for time to look into it, if objected to, it did not render it void, the statute not prescribing such a harsh effect. Creditors should have objected, and only those notified and who could have objected being bound by the judgment, and this purchaser and the plaintiff in execution having the notice required by law, and not objecting, we think are concluded, especially as this purchaser bought subject to homestead, and therefore bought only what the homestead did not take. This last fact alone is enough to rule the case as the judge below did, even if there are irregularities about the proceedings.

Judgment affirmed.

DAWSON et al., executors, vs. BEALL, administrator.

- 1. An agreement by a debtor not to go into bankruptcy and thereby be discharged from a certain debt, or at least imperil its collection, furnished a sufficient consideration to support a contract by the creditor to take less for the debt than the full amount thereof.
- 2. The verdict is supported by the evidence.

Contracts. Bankruptcy. Verdict. Debtor and Creditor. Before Judge WILLIS. Upson Superior Court. November Term, 1881.

An execution issued in May, 1872, against Daniel R. Beall in favor of Davis Dawson, to which an affidavit of illegality was filed, one ground of which was substantially as follows: Defendant borrowed money of the plaintiff prior to the war, mortgaging slaves to secure the debt; defendant lost a large amount of property by the war, and was unable to pay his debts; in 1867 plaintiff obtained judgment against defendant for the balance of the debt due him, and the following year the parties entered into an agreement by which defendant was to pay plaintiff in full satisfaction of the debt a sum which, added

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the amount already paid, would make the sum of 500.00, the amount originally borrowed, and that the ne should be paid as defendant by his personal laborald make it; defendant further agreed, as part of the ntract, that he would take no benefit of homestead, exaption or bankrupt laws; defendant paid off the debt accordance with the terms of this contract.

The plaintiff denied the terms of the contract as set rth in the affidavit.

Pending the cause, the original parties died, and their presentatives were made parties.

It is unnecessary to set out the evidence introduced on the trial. The jury found the issue in favor of the dendant, and judgment was rendered that the execution would be returned satisfied. Plaintiffs moved for a new ial on the following grounds:

- (1.) Because the verdict was contrary to law and the ridence.
- (2.) Because the verdict was contrary to the justice and quity of the case.

The motion for a new trial was overruled, and plaintiffs scepted.

HALL & SON; M. H. SANDWICH; W. S. WALLACE, y brief, for plaintiffs in error.

BOYNTON & HAMMOND; R. F. Patillo, for defendants.

ACKSON, Chief Justice.

The agreement not to make application for, and be disnarged from a debt in bankruptcy is a sufficient considration to support a contract to take a less sum for the ebt than what is due thereon. It is a new and valuable consideration for the reduction of the original debt. The greement not to be adjudicated a bankrupt, and thereby of to wipe out or endanger the whole debt, is certainly valuable consideration to support a promise to compro-

mise the debt, because it bargains not to extinguish all of it or at least not to imperil it. Code, §2880.

2. The verdict that a contract to reduce the debt in consideration of the defendants not going into bankruptcy was made by the parties, is supported by the evidence. Where it is conflicting, the finding of the jury with the approval of the presiding judge will not be disturbed by this court.

Judgment affirmed.

### WALKER et al. vs. GRADY.

- I. A bill was filed by a vendor of land against his vendee, praying, among other things, an account and settlement for the balance of purchase money. The defendant occupied the place by tenant. Questions of waste and of improvements made by defendant were involved. Special questions were submitted to the jury, one of them being whether defendant had made any improvements, and of what kind and value. The jury answered "yes, of a character that was needed:"
- Held, that a proper construction of such answer is that the improvements made were merely necessary repairs, and not of permanent benefit to the place, so as to be set off against complainant's claim.
- (a.) This construction is made more certain by the fact that the jury found the value of the property to be the same as the amount for which it was sold by the complainant, adding nothing for improvements.
- 2. Where a grantee of land in a deed made as security contracted to pay to the grantor a sum in cash (besides removing a specified encumbrance from the land) such contract was not fulfilled by paying a part of the cash and paying off a note given by the grantor to a third party with the balance, if such payment was voluntary, and unauthorized by the grantor.
- 3. The evidence supports the verdict.

Equity. Verdict. Debtor and Creditor. Contracts. Before E. N. BROYLES, Esq., Judge pro hac vice. DeKalb Superior Court. September Term, 1881.

ady filed his bill against Walker et al. He alleged, in , as follows: He owned a place in Dekalb county, h he had leased for a term of years. There was a gage on it for \$975.00. He agreed with Walker to ow from him \$1,200.00. The amount of the mortwas to be paid to extinguishing it; the balance to aid to Grady in cash. As security for this loan, he his wife joined in a deed to Walker for the place, he ng bond for titles, to be reconveyed on repayment of money. Instead of complying with his agreement, ker only paid on the mortgage about \$600.00, and to complainant about \$25.00. By agreement the e passed to Walker as landlord, with right to collect keep rents for interest. From poverty, complainant nable to free the place of incumbrance. Waste has n and is being committed. The prayer was for specific ormance; for injunction against waste; accounting,

efendant, H. H. Walker, answered, in brief, as fols: Paid off the mortgage, also paid off a note which ntiff had made to one Mathison for \$200.00, at his ince and request, and paid over the remaining \$25.00 ash. Denied waste; set up substantial improvements. ered to reconvey on payment of what was due him.

The evidence was conflicting, especially as to the aurity to pay the Mathison note. The verdict was based specific questions. One of them and the answer therewas as follows:

3rd. Did or not defendant, H. H. Walker, make any imvements on said lands? If so, what is the value of se improvements, and in what did said improvements sist, and the value of each kind?"

-"Yes, of a character that were needed."

The jury also found the present value of the place to be 200.00; and that Walker lacked \$200.00 of paying the 200.00 which he was to advance. The chancellor de-

creed that the place be sold, that \$1,000.00 be paid to Walker, and the balance to Grady.

Defendants moved for a new trial on the ground that the finding above stated was not sufficiently full to form a basis for a decree; and because the court charged as follows: "A voluntary payment, by H. H. Walker, of the Mathison note, unauthorized by Grady, would not be a compliance with the contract, if the contract was that he was to pay the Wallace mortgage, and pay the balance to Grady in cash; and if he took up the Mathison note without authority from Grady, it would be your duty to find for the complainant on that point."

The motion was overruled, and defendants excepted.

CANDLER & THOMSON; W. R. HAMMOND, for plaintiffs in error.

HENRY HILLYER; L. J. WINN, for defendant.

JACKSON, Chief Justice.

Taking the bill and amendments as found in this record and construing them together, it will be seen that equity is invoked to compel the specific performance of a contract in regard to land, and in the event that cannot be done on account of equitable reasons, then for an account and settlement for balance due from defendant to complainant springing out of the land trade in matters of waste and purchase money due. The jury returned a specific verdict in response to questions propounded, and found no waste by the defendant, no improvements by him put on the land, except necessary improvements, and a balance of two hundred dollars due from defendant for purchase money with interest from the time it ought to have been paid. A decree was entered on this verdict for two hundred dollars with interest, to be made by sale of the land. Whereupon a motion for a new trial was made and overruled, and defendant excepted.

. Two points are insisted on before us as reasons why motion should have been granted. The first is that verdict in answer to the third question is not suffintly full to render an intelligent decree upon it. The stion is in substance did defendant make improvents, and what kind and value, and the answer is, "yes, a character that was needed." We think that the aner means that the improvements were merely necessary airs to keep up the place, and of no intrinsic value or manent benefit to the place, so as to be set off by the endant, who occupied the land by tenants against the nplainant, who sold to him and sued him for account I settlement. This view is strengthened by the fact t the jury found the present value of the land to be 200.00, and the price for which complainant sold it to endant just the same sum, showing no improvements value put thereon. The verdict in answer to the quesn is therefore sufficiently full to authorize the decree. . The second point is that the court erred in charging the effect that a voluntary payment by defendant of a e of complainant would not be a compliance with the tract about the land, if he was to pay cash. We see error in the charge. The evidence of complainant is sitive that it was to be cash, that such payment was the y essence of the contract, and though denied by the er side and his testimony, the judge was right to subthe issue of fact to the jury.

The case was tried fairly and fully, the evidence supts the verdict, the verdict the decree, and we decline disturb either.

udgment affirmed.

Goldsmith vs. White,

# GOLDSMITH vs. WHITE.

- When land is described in a deed by metes and bounds, evidence is admissible to show that certain land in controversy is not included within such description.
- 2. The construction of a deed is for the court. In construing the desscription he is not limited to an exact direction of lines, but may construe the entire description together, including the termini of the lines, so as to reach a consistent and reasonable construction of the grantor's meaning.
- (a.) A deed contained the following as part of the descriptive portion thereof: "Commencing at Anderson's corner, near Dean's mill pond, and running north to where the fence now stands until it strikes near the creek, within distance sufficient to set a fence following the creek; but reserving, however, the land on said east side as far as the back water shall cover from said Dean's mill pond until the line reaches the ford of said creek:"
- Held, that the intention of the grantor was clearly to convey land only on the east side of the creek, and not that the line should cross the creek.
- 3. Under the above description the line did not run from Anderson's corner directly to the northwest corner of the field and thence to the ford, but to the southwest corner—the fence referred to being that on the east side of the creek.

Deeds. Title. Charge of Court. Evidence. Before Judge HILLYER. Dekalb Superior Court. September Term, 1881.

Goldsmith brought ejectment against White for certain land. The controversy arose thus: In 1850 Lemuel Dean was the owner of a large part of land lot No. 254, in Dekalb county. Across this lot ran from northeast to southwest Snapfinger Creek, and fowards the southwest part of the lot was the mill-pond, which extended in a general southwesterly direction. In 1850 Dean conveyed a lot to Wood, the description being as follows: "The east part of lot No. 254, with the following boundaries: commencing at Anderson's corner, near Dean's mill-pond, and running north to where the fence now stands, until

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it strikes near the creek within distance sufficient to set a fence following the creek, but reserving, however, the land on said east side as far as the back-water shall cover from said Dean's mill-pond, until the line reaches the ford of said creek. The east bank being the line up to Eskew's land," etc. Wood conveyed to Mosely, and Goldsmith claimed under this deed by a regular chain of title.

The dispute arises out of a construction of this deed. To begin at Anderson's corner, which was located south of the upper part of the pond, and run due north, the line would not touch any fence at all on the east side of the mill-pond or creek; but if it were continued due north across the mill-pond, it would strike an old fence line on the west side of the pond and running up the creek towards the ford. On the other hand, if, instead of running due north, the line from Anderson's corner were run a little northeast, it would strike the southwest corner of the fence enclosing what was known as "the Scott field," and from that point the fence would run nearly north to a point near the creek, which was the northwest corner of the Scott field. To run the line in this way would leave a parcel of land lying between it and the pond and creek, while to run directly north across the pond from the Anderson corner would include this tract. This piece of land which would be so left was conveyed by Dean to Murphy in 1855, and came from him to White by regular chain of There was conflicting evidence as to where the different owners claimed their boundary lines to be, and as to the exercise of acts of ownership, such as the splitting of rails, keeping up the fence line of the Scott field, etc.

The jury found for defendant. Plaintiff moved for a new trial on the following among other grounds:

- (1.) Because the verdict was contrary to law and evidence.
- (2.) Because the court allowed Wood to testify as follows: "The line of the land I sold Mosely began at Anderson's corner, as shown by plat, ran a northerly direction."

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tion to the Scott field, at the southwest corner, thence along said fence north to a distance sufficient from said field and pond to set a fence, thence along the fence to the old ford." Other witnesses gave similar testimony. In each case it was objected to on the ground that it conflicted with the deed.

- (3.) Because the court erred in that part of his charge to the jury in which he instructed them that by the terms of the deed from Wood to Mosely, the land in dispute was not conveyed to Mosely. That by the terms of said deed the fence therein mentioned had reference to what was shown on the plat as the Scott field, it being conceded this was the only fence on the east side, and by its terms it could have no reference to a fence on the opposite side of the creek or pond from the Anderson corner. That the description in said deed called for a fence on the east side of the creek; that the jury in determining the line of the land called for by the deed from Wood to Mosely were not confined to a line running in a north course from the Anderson corner, but would under said deed be required to confine themselves to a line running in a general northerly direction to a point within distance sufficient from said creek above high-water mark to set a fence, thence along the fence on the east side of the creek to the old ford.
- (4.) Because the court refused, upon request of plaintiff's counsel, to instruct the jury that if the fence around the Scott field was the one referred to in the deed from Wood to Mosely, and the fence called for by said deed, that the terms of the deed would require and call for a direct line from the Anderson corner to that part of the fence being nearest to the creek or head of said pond, to-wit, the northwest corner of said Scott field, and in charging that said deed called for a line from Anderson's corner to the nearest point of said field, to-wit, the southwest corner, thence north along said fence of Scott field to high-water mark, thence along the fence to the old ford.

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The motion was overruled, and plaintiff excepted.

. J. WINN, for plaintiff in error.

CANDLER & THOMSON, for defendant.

AWFORD, Justice.

The plaintiff in error brought this suit against the deidant in error to recover fifteen acres of land, more or s, off of land lot number 254, in Dekalb county. The ry, under the charge of the court and the evidence, found ainst him, and he made a motion for a new trial, which e court refused, and he excepted.

Both parties claim under one deed, and the dispute ises upon the following description contained in the iginal deed: "Commencing at Anderson's corner, near ean's mill pond, and running north to where the fence is stands until it strikes near the creek, within distance fficient to set a fence following the creek. But reserve, however, the land on said east side as far as the back after shall cover from said Dean's mill pond, until the line aches the ford of said creek."

It is claimed by the plaintiff in the suit that there were to fences, one on the east, the other on the west side of is pond, and that the real line was to run across the ond directly north, until it struck the fence on the west de; and by the defendant, that the line was to run to be fence on the east side which was only east of north om the beginning corner.

Much testimony was introduced to explain the location these fences and fields, and exactly where the line ran cording to the fact and the deed.

I. It is insisted that the court erred in permitting cerin witnesses to testify in reference to this line, because eir testimony was at variance with the description set at in the deeds.

The record discloses the fact, that the land in dispute

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was conveyed by deed, and described therein by metes and bounds. The conveyance was made more than thirty years before the trial, and there was no error in allowing evidence to be introduced to show where the points named in the deed were, and that the particular plat or tract of land in dispute was not covered by or included within the boundaries named. 57 Ga., 113; 49 Id., 99; 20 Id., 689.

2. It is further alleged as a ground for a new trial that the judge erred in charging the jury that the legal effect of the deed from Wood to Mosely was not to convey the disputed land to the latter. The construction of this deed was matter for the court; and as by the description of the land it called for a fence on the east side of the creek, it could by no possibility refer to a fence on the west side. Besides, such a construction as claimed by the plaintiff would defeat the whole object of the grantor in protecting the east side of the creek, that he might thereby protect his pond and thus secure its benefits to the land reserved, and never intended to have been included in the conveyance. The very words of the deed were, that the line was to run only where the fence stood, "until it strikes near the creek," and it nowhere says across, or even to the creek, but near the creek.

The construction which the court gave to the deed was the only fair one which could have been given consistent with itself. It is true that if nothing else except the direction had been given, that would have been absolutely controlling and must have carried the line where the plaintiff claims that it was intented to have gone, that is north, but the whole description of the line must be taken together.

3. The plaintiff in error alleges that the judge improperly instructed the jury, even if the fence on the east side of the creek were the fence referred to, because the line of the fence which should have been considered, was that part of the same being the nearest to the creek, and was the northwest instead of the southwest corner. If that con-

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action had been given to the deed, the whole line of ce from the southwest to the northwest corner where it od at the making of the deed would have been ignored, I there would have been no need of reference to it at except to say that the line should run from the Ander-a corner direct to the northwest corner of this field thence to the ford.

In looking through the whole case, we find no error of v committed by the judge, and are of opinion that the idence fully supports the verdict.

Judgment affirmed.

### DOHME vs. THE STATE OF GEORGIA.

[This case was argued at the last term and the decision reserved.]

In an indictment for keeping a gaming house, the description of the house as to location need not be more definite than that it is in the county.

Where an indictment contained two counts, one charging the keeping of a gaming house, the other the renting of rooms for the purpose of gaming, a general verdict of guilty was sufficient without specifying on which count it rested.

The verdict is upheld by the evidence.

Criminal Law. Indictment. Verdict. Before Judge ARK. City Court of Atlanta. March Term, 1881.

An indictment was preferred against Dohme containing of counts. The first charged that "the said Robert hme, in the county aforesaid, on the first day of April, the year of our Lord 1881, with force and arms did ep, have, use and maintain a gaming house, contrary to claws, etc." The second count charged that the dedant knowingly rented said house for gaming purposes. Defendant demurred to this indictment as insufficient charge any offense and because no house was specified which the offense was committed. The demurrer was

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overruled. It is unnecessary to set out the evidence introduced. The jury found the defendant guilty. He moved for a new trial on the following grounds:

- (1.) Because the court overruled the demurrer to the indictment.
- (2.) Because the court charged the jury that if they found defendant guilty on either or both of the counts, to render a general verdict of guilty.
- (3.) Because the court refused to charge, as requested by defendant, that if they found him guilty on one count and not guilty on the other count, to specify in their verdict on which count they found him guilty. The defendant requested the court thus to charge immediately on the retiring of the jury, and before they had time to consult on the case. [The judge in a note says that after the jury retired counsel requested him verbally to recall them and charge that they should specify on which count, if they found defendant guilty, and he declined.]
- (4.) Because the verdict is contrary to evidence and law.
- (5.) Because the court admitted over defendant's objection the testimony of Crawford, Kimbro and Harrison as to any house being rented or used, there being no charge in the presentment authorizing the introduction of such testimony.

The court overruled the motion and defendant excepted.

HOPKINS & GLENN, for plaintiff in error.

W. D. ELLIS, solicitor city court, for the state.

JACKSON, Chief Justice.

The defendant was indicted for keeping a gaming house on two counts, one for keeping such a house, the other for renting rooms for the purpose of gaming.

He was found guilty, and on the denial of a new trial by the court excepted.

- 1. The demurrer was properly overruled. The description of the house, its locality, except that it be in the county, need not be set forth in the indictment; and it is sufficient in other respects to set the offense out so plainly that the charge may be easily understood by the jury. Code, §§4628, 16 Ga., 467; 25 Ib., 474; 33 Ind., 304; 2 Brev., 487; 33 New Hamp., 212.
- 2. A general verdict will suffice, and the count on which it is returned need not be indicated, especially if the punishment is the same for each offense. 58 Ga., 577; 46 Ib., 208: 5 Wheaton, 184; I Blackf., 33.
  - 3. The evidence fully supports the verdict. Judgment affirmed.

### BARNHART & KIMBROUGH vs. L. & S. STERNBERGER.

- I. A failure to attach a paper to the answer to a cross-interrogatory will not be a ground for rejecting the answers, where it appears that it could not have benefited the objecting party if attached; and especially so where the witness testifies that a letter such as that described in the interrogatory was never received by him.
- (a.) The failure of a plaintiff's witnesses examined by interrogatories, to set out in detail information called for in the direct interrogatories, is no ground for rejecting the answers at the instance of the defendant; especially not where the direct interrogatory called for certain papers to be attached to the answers, and the witness testified that it was impossible to do so.
- Where no damages can be recovered under the evidence offered to support a plea of recoupment, it is immaterial whether a charge as to the measure of damages is correct or not.
- 3. The verdict is supported by the evidence.

Evidence. Interrogatories. Contracts. Damages. New Trial. Before Judge LAWSON. Greene Superior Court. September Adjourned Term, 1881.

L. & S. Sternberger brought suit against Barnhart & Kimbrough for \$140.00, as the purchase price of fourteen dozen "Pearl" shirts.

Defendants pleaded the general issue, and also filed a bill of recoupment, in substance, as follows: At the time they made their contract with plaintiffs the latter agreed not to sell the same sort of goods to any other person living in the same town with defendants (Greensboro Ga.), and that the latter should have the exclusive right to sell such goods there. Relying upon this, defendants commenced the purchase of this class of goods from the plaintiffs, introduced them into the community, and were realizing a handsome profit on them, amounting to about seventy-five dollars per annum. Soon after the making of the purchase involved in this suit, plaintiffs violated their obligation, and began to sell shirts of this kind to a competing merchant in the same town. Defendants noti fied the plaintiffs of their breach of contract and offered to return these goods, as they did not wish them unles they could handle them exclusively. Plaintiffs assured them that the mistake should not occur again, and there upon defendants retained and sought to sell the goods Plaintiffs, however, continued to violate their agreemen and sell to the other merchant. Defendants were, there fore, unable to sell the shirts on hand, and their trade is them was broken up. They fixed their damages at \$300.00

Counsel for plaintiffs sued out interrogatories for L Sternberger and S. Sternberger, the plaintiffs, and J. A Magee, their book-keeper, all of them being non-residents. These interrogatories were crossed by counsel for defendants, and forwarded for execution. Only Magee answered He swore to the correctness of the account; denied any such agreement as that set up by defendants, and also denied that any one was authorized to make any such agreement for the plaintiffs.

In the direct interrogatories, plaintiffs' attorneys asked that a statement of the orders of the defendants be at tached to the answers. The witness merely answered that it was impossible at present.

One of the cross-interrogatories, and the answer there to, was as follows:

econd cross-interrogatory—To all witnesses: Did you ever receive communication from defendants complaining that your house had ed its contract by selling the same sort of goods mentioned to in Greensboro, Ga? If yea, attach said communication to your er. Did you not reply to them, promising to rectify the wrong or the? If so, why did you not do it?

second cross-interrogatory Magee answers: We never had any laint from them until after the maturity of this bill, and they had to honor our draft therefor. We had sold them bills previously for od extending over eighteen months or more, and had heard no refe to any agreement or claim that there was such an agreement as set up, that the goods were not to be sold to other parties. Inof honoring our draft, they wrote saying they had a claim to. We, supposing it had reference to damages to a shirt, of small ent, wrote we would allow such claim,—not supposing it amountmore than a dollar or so. Subsequently to this, probably two s, in answer to a letter from us insisting on payment, we received from them first making this claim. We wrote them that we had owledge of such an agreement, and that we positively would not it. They then said that the agreement was made at the time of rst purchase, which was over a year before that. We regarded a subterfuge to avoid payment of the bill, and gave the matter to ttorney for action."

the introduction of these interrogatories defendants' is el objected, because all the witnesses did not an; because the papers called for in the direct interroges were not attached to the answers, and because the r called for in the second cross-interrogatory was not ched to the answers. The objection was overruled, the testimony admitted.

imbrough, one of the defendants, testified to the concand the breach thereof, substantially as stated in the He stated that the contract was made in the spring 877, with one Davis, as the agent of the plaintiffs, ugh whom they gave their first order for shirts; that did not obligate themselves to buy more shirts after first lot, nor was anything said about the time for the contract was to continue, but when the first was exhausted, defendants continued to order lots of its from plaintiffs; that plaintiffs, in accordance with

this contract, would furnish the defendants circulars with each lot of shirts, which stated that they were sold only by the defendants.

The jury found for plaintiffs. Defendants moved for new trial on the following grounds:

- (1.) Because the court erred in permitting plaintiffs counsel to read to the jury, over the objection of defend ants' counsel, the interrogatories as stated above.
- (2.) Because the court erred in charging the jury that the measure of damages in this case was the difference be tween the price at which defendants could have sold the goods sued for before the alleged breach of the contract, and the price they were compelled to sell them at in consequence of said breach of the contract; that the jury should look at the evidence and see if defendants, in consequence of said alleged breach of the contract on the part of plaintiffs, were compelled to take less for the 14 dozen shirts sued for; if so, how much less. Such an amount would be the measure of defendants' damages, and is all they can set off or recoup against plaintiffs' claim. If there are no damages of this kind proved, the jury should find for plaintiffs the full amount sued for, if proved to their satisfaction.
- (3.) Because the verdict is contrary to the law and evidence, and strongly and decidedly against the weight of testimony.

The motion was overruled, and defendants excepted.

H. T. & H. G. LEWIS; C. HEARD, for plaintiffs in error.

JAS. L. BROWN; JNO. C. REED, for defendants.

JACKSON, Chief Justice.

This was an action on an account for goods sold, to which the defendants sought to recoup the breach of an agreement on the part of plaintiffs not to sell to any other

merchant in Greensboro similar shirts to those sold to them, which the plaintiffs broke, and this breach of contract at the date of sale damaged the defendants three hundred dollars.

The plaintiffs recovered their account in full, and the defendants moved for a new trial, which motion was denied them, and they excepted.

I. The interrogatories were properly read to the jury; because if the letter had been set out in full in answer to the cross-interrogatory, it could not have benefited defendants. It was also not the letter asked for by the cross-interrogatory, and the witness had not such a letter.

We know no law which compels a party to examine all the witnesses he subpœnas, or sues out commissions to examine, even though they all be named in one commission.

The failure to set out in detail what the plaintiffs desired their witness to do in response to their own question, is no reason why the interrogatories should be rejected on motion of defendants; especially as the witness replied that it was then impossible to do so. So that the interrogatories should have been read to the jury.

2. The defendant failed to establish by proof such a contract as that its breach could be recouped. There was no proof how long they were to have the exclusive sale of the shirts in Greensboro, nor a sufficient consideration to support it, nor the authority of the agent to make it when made so as to bind his principals for all goods sold after he ceased to be their agent, and for an indefinite time.

There being no sufficient proof of the contract, the breach of which was the damage to be recouped, the measure of that damage was immaterial, there being nothing to be measured.

3. The verdict is supported by the evidence, and is not contrary to law.

Judgment affirmed.

Chamberlin & Co. vs. Beck, Gregg & Co. et al.

# CHAMBERLIN & COMPANY vs. BECK, GREGG & COM-PANY et al.

 The affidavit to foreclose a mortgage on personalty may be made before the clerk of the superior court, and execution may thereupon issue without any order from the judge.

2. The execution in this case substantially follows the affidavit.

(a.) A direction in a mortgage fi. fa. that of the personalty covered thereby the sheriff make a specified sum, is in effect a direction to sell for that purpose.

3. Where a debtor made a single mortgage covering a stock of goods to secure two creditors to the amounts respectively due them (stating each), the mortgage could be foreclosed in favor of both creditors at the same time; and such foreclosure would not be the joining of distinct and separate claims in the same action.

 Section 3635 of the Code providing for the return of fi. fas. means that they shall be returnable to the next term after the money can

be lawfully made.

A new stipulation or condition cannot be engrafted upon a mortgage by parol, under the guise of a plea of recoupment.

Mortgages. Executions. Actions. Practice in Superior Court. Before Judge BROWN. Dawson Superior Court. September Term, 1881.

On the twenty-ninth day of January, 1881, E. B. Chamberlin & Co. executed a mortgage, covering their stock of merchandise, to Moore, Marsh & Co., and Beck, Gregg & Co., to secure the payment of two debts, one in favor of Moore, Marsh & Co., for \$993.91, represented by note, dated 29th January, 1881, and due one day after date, the other in favor of Beck, Gregg & Co. for \$1,002.36, by note, dated January 29th, 1881, and due one day after date, with interest, costs and attorneys fees involved in collecting both notes. The mortgage was recorded February 1st, 1881.

On the 12th April, 1881, W. A. Gregg, of the firm of Beck, Gregg & Co., and as agent for the firm of Moore, Marsh & Co., made a single affidavit before the clerk of the

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superior court of Dawson county for the foreclosure of this mortgage, and stated in the affidavit that there was due on the mortgage to Beck, Gregg & Co. \$1,002.36 principal, \$14.22 interest, and \$102.00 attorney's fees, and to Moore, Marsh & Co. \$993,91 principal, \$14.06 interest, and \$00.00 attorneys fees. The clerk issued an execution dated 12th April, 1881, commanding the officer to "cause to be made" of said merchandise \$1,002.36 principal, \$14.22 interest, and the further sum of \$993.91 principal, and \$14.06 interest, to satisfy the principal and interest, together with costs of the proceeding to foreclose a mortgage in favor of Moore, Marsh & Co. and Beck, Gregg & Co. on said property, which sums of money are due to the said Moore, Marsh & Co. and Beck, Gregg & Co. by the said E. B. Chamberlin & Co., as appears by the affidavit of W. A. Gregg," etc. The fi. fa. was made returnable to the September term of court, and was levied on the merchandise mentioned on the 12th of April, 1881. (The superior court of Dawson county holds its sessions on the third Monday in April and second Monday in September.)

On the application of plaintiff, the judge of the superior court granted an order for the sale of said stock of goods, on ten days notice, the sheriff to hold the money arising from the sale subject to the order of the court.

To these proceedings of foreclosure, defendant on the third day of May, 1881, filed an affidavit of illegality on the following grounds:

- (1.) Because the affidavit for the foreclosure of the mortgage was made before the clerk of said court.
  - (2.) (Abandoned.)
- (3.) Because the execution does not follow the affidavit, and does not specify to whom each sum for which it issued belongs.
- (4.) Because said execution does not command the sale of the property mentioned in said mortgage.
  - (5.) Because said affidavit and execution embrace and are

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proceeding for two separate and distinct claims of different persons, whose interest is several.

- (6.) Because the execution is not returnable to the term of said court next after it issued.
  - (7.) (Abandoned.)

(8.) "Because at the time of the execution of said mort gage and in consideration of the execution of the same the plaintiffs undertook, agreed and faithfully promised defendants not to foreclose the same until after the cottor crop of the present year should be put on the market, and relying on said agreement, undertaking and promise of plaintiffs, defendants executed said mortgage. But the said plaintiffs, utterly disregarding their said agreement undertaking and promise, and in violation of the same made said affidavit and caused said execution to issue at a time when defendants were not expecting such a proceeding, and were wholly unprepared to pay the sums claimed on said mortgage, and caused said execution to be levied on the property mentioned in said mortgage, closed up their place of business, and thus stopped and destroyed the business of defendants as merchants, by which they were making a profit of one hundred dollars, or some other large sum of money, per month, and greatly injured the credit of defendants, to their great injury and damage to-wit, in the sum of three thousand dollars, or some other large sum of money. And these defendants plead the same by way of recoupment against the plaintiff's claim under said mortgage, and of this they put themselves up on the country," etc.

The case came on for trial at the September term, 1881 of the superior court, when the court, on motion of plain tiff's counsel, passed the following order:

"It appearing to the court that the property has been sold and the sheriff having answered to a rule that he has the money in court ready for distribution, it is ordered that the illegality be overruled. This 25th September, 1881.

(Signed)

James R. Brown, Judge S. C. B. R. C."

To this judgment defendants excepted.

Chamberlin & Co. vs. Beck, Gregg & Co. et al.

M. L. SMITH; H. C. JOHNSON; JAS. M. BISIIOP; HARRISON & PEEPLES, for plaintiffs in error.

No appearance for defendants.

JACKSON, Chief Justice.

- 1. To foreclose a mortgage on personalty, the affidavit may be made before the clerk of the superior court, and execution issue without any order from the judge of the superior court. Code, §3971.
- 2. Substantially the execution follows the affidavit and specifies the sum due each of plaintiffs. It commands a sale, because it requires the sheriff to make the money out of the mortgaged goods.
- 3. The mortgage is one. It is on the same goods to secure two firms for several sums due each, but on one instrument under which each plaintiff claims. One foreclosure, therefore, of the one mortgage under which both plaintiffs claim is not obnoxious to section 3256 of the Code, which declares, "that distinct and separate claims of or against different persons, cannot be joined in the same action." It does not hurt defendants to make one foreclosure; it saves costs and helps them.
- 4. The execution was properly returnable to the next term after the money could possibly be made by levy and sale, and it were folly to order the sheriff to return the money into court at a term when he could not have had time to make it. Code, §3635, means that next term after it can be lawfully made.
- 5. The plea of recoupment is an attempt to engraft a new stipulation or condition on the mortgage by parol testimony. This cannot be done.

So that without reference to the reason given by the court for the judgment, that the money was already in court, the affidavit was properly overruled on demurrer thereto.

Judgment affirmed.

## THE GEORGIA RAILROAD COMPANY vs. GANN & REAVES.

- 1. The verdict is supported by the evidence.
- A general stipulation or notice in a bill of lading will not limit the liability of a common carrier; an express contract is necessary for that purpose. Such is the meaning of the charge in this case.
- (a.) An express contract will not protect a common carrier from the results of its own negligence in running its trains.
- Where goods are shipped over a connecting line of railroads, the last road of the line receiving them as in good order for transportation is liable to the consignee for damages.
- (a.) Goods were billed from St. Louis, Mo., to Athens, Ga.; as far as Atlanta, Ga., through rates of freight were paid, and from Atlanta to Athens local rates were charged:
- Held, that even if this did not make the Georgia Railroad (from Atlanta to Athens) liable as the last road of a through line, still the receipt by it of the goods for transportation without exception was impliedly a receipt as in good order, and would render that road liable for damages occurring thereto.

Railroad. Damages. Negligence. Verdict. Charge of Court. Contracts. Before Judge POTTLE. Clarke Superior Court. November Term, 1881.

A car load of hay was shipped by Marmaduke & Brown, at St. Louis, Mo., to Gann & Reaves, at Athens, Georgia. As far as Atlanta, Georgia, through rates of freight were charged; from Atlanta to Athens local rates were charged. The hay arrived at its destination by the Georgia railroad, hot, molded and badly damaged. The consignees refused to receive it from the Georgia railroad, and the company sold it and kept the proceeds. Gann & Reaves brought suit against the road for the damage done. The evidence was conflicting as to whether the damage to the hay resulted from leaking of rain into the car (the fact of leakage being established) or from improper baling of the hay before shipment. There was also some conflict in the testimony as to how long the hay was on the road. One of the plaintiffs testified that it was three weeks from its

shipment to its delivery, while some witnesses for the defense calculated the time to be about two weeks or less.

The bill of lading was as follows;

"ST. LOUIS AND IRON MOUNTAIN RAILROAD COMPANY—GREEN LINE.

ST. Louis, Feb. 17th, 1874.

Rates guaranteed to Atlanta, Georgia. Special \$100.80 per car.

Received from Marmaduke & Brown the following packages, contents unknown, in apparent good order, viz: N. & N. W. 218, 1 car 73 bales hay, shippers count—Gann & Reaves, Athens, Ga."

S. FRINK, St. L., G. Frt. Agt.

"Marked and numbered as per margin to be transported from St. Louis to Columbus, Kentucky, and delivered to Nashville and Northwestern railroad. The packages aforesaid must pass through the custody of several carries before reaching their destination, and it is understood as a part of the consideration for which the said packages are received, that the exceptions from liability made by such carriers respectively shall operate in the carriage by them respectively of said packages as though inserted at length, and especially that neither said carriers, nor either or any of them, shall be liable for leakage of any kind of liquids nor for losses by the bursting of casks or barrels of liquids arising from expansion or other unavoidable causes; breakage of any kind of glass, carboys of acids or articles packed in glass, stoves and stove furniture, castings, machinery, carriages, furniture, musical instruments of any kind, packages of eggs, or for loss or damage of hay, hemp, cotton, or the evaporation or leakage of liquids of any description, leakage of grain in bulk, or for damages to personal property of any kind occasioned from delay from any cause, or change of weather, or for loss or damage by fire, or for loss or damage on the sea or rivers. And it is further especially understood that for all loss or damage occurring in the transit of said packages the legal remedy shall be against the particular carrier only in whose custody the said packages may actually be at the time of the happening thereof, it being understood that the St. Louis and Iron Mountain Rai!road Company, in receiving said packages to be forwarded as aforesaid, assumes no other responsibility for their safety or safe carriage than may be incurred on its own line. All goods carried by this company are charged at actual gross weight, excepting such articles as are provided for in our general tariff. All property will be subject to necessary cooperage, and freight is to be paid on the actual gross weight as ascertained by the company's scales. Road not accountable for loss in weight of flour, grain, seeds,

feathers and ginseng, arising from unavoidable cause. Cotton in bales owner's risk of wet and dirt. Claims for damages must be reported to consignee to the delivering line within thirty-six hours after the arriv of the freight at the place of delivery indicated above. In the eve of the loss of property under the provision of this agreement the val or cost of the same at the point of shipment shall govern the settlement. No liability will be assumed for wrong carriage or wrong delivery of goods that are marked with initials, numbered or imperfect marked. Weight and classification subject to correction.

(Signed) St. Louis and Iron Mountain R. R. Co."

A. L. HARVEY, Contracting Agent.

The jury found for the plaintiffs \$953.50. Defendar moved for a new trial on the following, among other grounds:

- (1.) Because the verdict was contrary to law and the evidence.
- (2.) Because the court charged as follows: "A Commo carrier may limit its liability by express contract with the shipper. Any other limitation of its liability is voland in contravention of law. If there had been an express contract between Marmaduke & Brown, as authorized agents of the plantiffs, and the Iron Mountain Raircad Company, outside of the receipt or bill of lading limiting their liability, that contract would bind the plaintiffs, but a stipulation in the receipt, as in this case, signed by the railroad company, is not binding on the plaintiff and you will not consider it.
- (3.) Because the court charged, in effect, that if the defendant received the hay on the car in which it was, from a connecting road—the Western and Atlantic Railroad "as in good order," the defendant would be liable for a damage unless it showed that the hay was damaged before shipment. [One count in the declaration charged receipt from the Western and Atlantic Railroad.]
- (4.) Because the court charged that if "the hay was received by the St. Louis and Iron Mountain Railroad with out exception and in good order, and that it was a connecting road of the Georgia Railroad and Banking Com

ny, and said defendant received said hay as in good ler in Atlanta, and when the hay arrived in Athens it s damaged, then plaintiffs should recover."

The motion was overruled, and defendant excepted.

JOS. B. CUMMING; GEO. D. THOMAS; S. P. THURDIND; EMORY SPEER, for plaintiff in error.

A. J. COBB; L. & H. COBB, for defendants.

CKSON, Chief Justice.

- The evidence in this case is sufficient to support the rdict. The hay was damaged, and the question was w. Was it done before shipped, or while in the custody the carrier? The car which contained it leaked; it was me weeks on its way from St. Louis to Athens, and oof was in to show that this leakage caused the rot nich damaged the hay. It is true that there is conflicted testimony as to what caused it, in the opinion of different witnesses, but the jury settled that issue, and it is tour habit to unsettle it.
- 2. By using the term "outside" of the receipt or bill lading, we think, by a fair construction of the judge's arge, that he meant the contract between the shipper d carrier, so as to take the case without the provision section 2068 of our Code, must be an express contract dependently of a general stipulation or notice on the ceipt given. Nor do we think that he erred in ruling at the bill of lading in this case is not such an express ntract as the statute law of Georgia prescribes; for an spection of it shows that it is a general bill of lading plicable to all manner of freight, and not at all an exess contract entered into between the parties for this se. Even if it were an express contract, that would not otect it against negligence. 28 Ga., 543 et seq.
- 3. Under section 2084, the defendant, the Georgia Railad Company, being the last which received these goods

Graham et al. vs. Hall.

"as in good order," and one over which they were "intended" to pass to reach Athens, is liable to pay for the loss or damage. This is unquestionably so if that company be in the St. Louis bill of lading.

If it be not in that contract or bill of lading, then the fact that it took the goods at Atlanta to transport to Athens, and thereby acknowledged them to be in good order, would fix the liability upon this company upon the implied contract safely to deliver them at Athens.

So that in any view we are able to take of it, the cas is with defendants in error, and the judgment is affirmed Judgment affirmed.

## GRAHAM et al. vs. HALL.

A bill which seeks to cancel a sheriff's deed to property of the complainant and remove a cloud on his title on the ground that the judgment under which the sale was made was rendered by a cour which had no jurisdiction, is not without equity.

2. While the county surveyor's duty includes the making of any survey in which the county is interested, when required so to do be the ordinary, yet commissioners appointed by the ordinary to late out new militia districts or change the lines of those already in existence are not limited to the employment of the county surveyor to assist them in so doing.

3. One question in a case being whether the residence of a person sue in a justice court was in the district where suit was brought, o whether it had been transferred to another district by a change o lines, it was competent to show by witnesses who knew the old and new lines how the residence of the defendant had been affected by the change. The lines of the militia districts were matters of record but the location of the defendant's house in respect thereto could only be proved by parol.

4. A judgment founded on a suit in a justice's court which had no jurisdiction of the person of the defendant is void, unless the defendant waived jurisdiction or appeared and pleaded to the merits.

5. The verdict is supported by the evidence.

Title. Courts. Jurisdiction. Judgments. Evidence. Before Judge SIMMONS. Appling Superior Court. October Term, 1881.

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### Graham et al. vs. Hall.

To the facts reported in the decision it is only necessary to add the following: The object of this bill was to set aside a sheriff's sale under a justice court fi. fa. issued on a judgment rendered in the 457th district, G. M., while complainant alleged he was a resident of the 443d district, the bill sought to enjoin plaintiff in f. fa. from proceeding further with it, and that he had never waived the jurisdiction, and therefore the fi. fa was a nullity. Complainant 'contended that sheriff's deed was a cloud upon his title, and should be set aside. Defendant moved to dismiss the bill for want of equity. The motion was overruled and the case went to trial. It is unnecessary to set out the evidence further than to state that complainant introduced testimony tending to show that prior to the suit the lines of the district had been so altered as to change his residence from the 457th district to the 443d.

The jury found for complainant. Defendants moved for a new trial on the following grounds:

- (1.) Because the court refused to dismiss upon ore tenus demurrer of the respondent to the equity of the bill.
- (2.) Because the court refused to charge the following written request of respondent: "That in changes of lines of militia districts the county surveyor is required to. make the survey, and that no other surveyor is authorized under the law to make the survey of the lines unless no county surveyor is appointed, that is elected and qualified, and that if the jury should find from the evidence that any other surveyor than the county surveyor made the survey, unless some reason why the county surveyor did not make the survey be shown, the survey would be void, and no change could be made. That every presumption is in favor of jurisdiction, and that in order for the complainants to attack successfully the judgment he must not only show that he was not a resident of the 457th district when the suit was commenced, but he must also show that he did not appear and plead to the suit.

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That the changes of the lines of a militia district must be shown by the record in the ordinary's office, and that record must show the appointment of commissioners to change the line, and that those commissioners acted upon the appointment of the ordinary, otherwise the proceedings are void. The acts of a court of ordinary in matters of this kind are the acts of a court of limited jurisdiction, and every fact necessary to give the court jurisdiction must appear upon the record, otherwise the proceedings are void."

- (3.) Because the verdict is contrary to law and evidence.
- (4.) Because the court erred in allowing the witnesses (Branch and Mobley) to testify as to the change of the district line, over the objection of respondents that if such change was made it was done by the court of ordinary, and that the records of that court would be higher and better evidence.
- (5.) Because the court erred in charging the jury that in order for a justice of the peace of a militia district to have jurisdiction in a case it is necessary for the defendant to reside in the district in which suit was brought, and that if the jury should find from the evidence that the complainant did not reside in the district in which suit was brought, on which fi. fa. issued under which the land was sold, that the court had no jurisdiction, and the sale made under the fi. fa. was void, and respondents got no valid title; and in order to avoid this and show that the court had jurisdiction, respondents must show that Morris Hall appeared and pleaded to the case.
- (6.) Because the court erred in allowing the witness (Carter) to swear as to tendering affidavit of illegality to the sheriff without showing the affidavit itself, in order that the court might judge of its sufficiency, and because there was no evidence of the loss or destruction of the same, if it existed.
- (7.) Because the court erred in allowing parol evidence of the proceedings of the court of ordinary as to change

#### Graham et al. vs. Hall.

of the district line. (The record of the court of ordinary showing the change of line was introduced. Witnesses were also allowed to state that the lines were so changed as to exclude the residence of complainant from the 457th and include it in the 443d district.)

The motion was overruled, and defendants excepted.

HARRIS & KAY; R. T. WILLIAMS; HARRISON & PEE-PLES, for plaintiffs in error.

J. J. CARTER; ROBERTS & DELACY, for defendant.

Speer, Justice.

Morris Hall filed his bill alleging that a certain tract of land therein described was his property, that the same was sold by the sheriff of Scriven county, at public sale, and purchased by Graham, the plaintiff in error. Sale was made under a justice court fi. fa. in favor of respondent, Crumming, against complainant. That the court rendering the judgment had no jurisdiction, for that when the suit was brought and judgment rendered complainant was not a resident of the 457th district, in which said suit was brought, but was a resident of the 443d district. Complainant did not appear and plead, and in no manner waived the jurisdiction or consented thereto. He, therefore, prays cancellation of the deed executed by the sheriff to Graham. On the trial respondents moved to dismiss the bill for want of equity, which was overruled. Under the evidence and charge, a verdict was rendered for the complainant. Respondents made a motion for a new trial, which was refused, and respondents excepted.

I. The first ground of error was the refusal of the court to dismiss the bill on demurrer. The demurrer admits the allegations in the bill to be true, and this being so, the bill is not without equity. It is filed for the purpose of removing a cloud upon the title of complainant to the land in controversy. He alleges the judgment and

#### Graham et al. vs. Hall.

- fi. fa. thereon were rendered by a court that had no jurisdiction, and were, therefore, void. If so, the sale and purchase were void, and a court of equity will aid complainant in having the sheriff's title executed to Graham set aside and cancelled. Code, §3232. The judgment of a court having no jurisdiction is void and may be attacked in any court where it becomes material to the interest of the parties to consider it. Code, §3594; 34 Ga., 253, 178; 11 Ib., 453.
- 2. We do not think the refusal of the court to give in charge the whole written request contained in the second ground of the motion was error. Under the law, commissioners appointed by the ordinaries to lay out new militia districts, or change the lines of those existing, "have authority to engage the services of a competent surveyor to assist them in their duties." They are not limited to the county surveyor. Code, §485. Section 574, defining the duties of the county surveyor, makes it one of his duties "to survey county lines and district lines, or other surveys in which his county may be interested whenever required by the ordinary," but this does not, in our opinion, repeal section 485, that expressly authorizes the commissioners "to engage the services of a competent surveyor."

While portions of this written request might have been proper, yet, as the whole request was sought to be given in charge, and the whole was not a legal charge, the refusal to give the whole written request was not error.

3. Neither was it error in the court to allow the witnesses, Branch and Mobley, to testify as to the change of the lines of the district, by which the residence of the complainant was changed from 457th district to the 443d district. The record in the court of ordinary could not have established the place where the complainant resided, or shown in which district he lived. While the lines of the district were a matter of record, yet the residence of the defendant was not, and we think it was competent to show by witnesses who knew, the original and changed

es, how the residence of the defendant was affected by e change thus made, and, therefore, to show in what disct the residence of complainant was left after the change as made.

- 4. The court did not err in instructing the jury, as comained of in the fifth ground, that if the evidence owed that the complainant did not reside in the district which suit was brought, on which the fi. fa. issued and ider which the land was sold, that the court had no juriscition, and the sale made under it was void, and responsint got no title; and in order to avoid this and to show the court had no jurisdiction, it must appear that comainant had appeared and pleaded to said suit.
- 5. We find no error in the sixth and seventh grounds the motion, as therein complained of. There was, in ar opinion, sufficient evidence to sustain the verdict, and being approved by the court below, we do not feel warnated in disturbing it.

Judgment affirmed.

## THORPE vs. WRAY.

The unlawful detention of the person of another, though under a warrant, will give a right of action if done in bad faith.

If the warrant be void, the action may be brought in the form of trespass, and not necessarily in the form of an action on the case. The verdict is not contrary to law, evidence or the charge of the court.

- The question of damages is peculiarly one for the jury, and their verdict will not be set aside as excessive, unless it is so excessive as to justify the inference of gross mistake or undue bias.
- Newly discovered testimony, the object of which is to impeach a witness, and which is merely cumulative in its character, will not cause a new trial.
- In an action for false imprisonment under a warrant, it was competent to show a re-arrest under the same warrant on a day subsequent to that on which the arrest involved in the suit was made. Such testimony tended to illustrate the question of good or bad faith on the part of the prosecutrix.

- 6. A female witness, when asked whether she was not an inmate of a house of prostitution, could claim her privilege as a witness on the ground that the answer would tend to disgrace her, and refuse to answer.
- 7. Where counsel for one party for the purpose of impeaching the opposing party, who was on the stand as a witness, caused her to testify that she had pleaded guilty to a charge of assault and battery, it was competent in rebuttal of such fact to show the reason why she entered that plea.
- 8. The circumstances attending the arrest and imprisonment which formed the basis of this suit for false imprisonment, including an offer by the person arrested to the arresting constable to give bail, were admissible as part of the res gestæ.
- 9. There was no error in the rulings complained of in the 13th, 14th, 15th, 16th and 17th grounds of the motion for new trial.
- 10. Grounds of a motion for new trial not authenticated by the court below will not be considered by this court.
- 11. Is not the rule requiring that a prosecution must be ended before a right of action therefor accrues limited to a suit for malicious prosecution; or will it extend to an action for trespass founded on the arrest and imprisonment? Quære.
- (a.) There is sufficient evidence in this case to sustain a finding that the prosecution was at an end.

Actions. Damages. False Imprisonment. Non-suit. Verdict. New Trial. Evidence. Witness. Before Judge HARDIN. City Court of Savannah. May Term, 1881.

Maud Wray brought an action of trespass against Mary Thorpe, alleging that the latter did "unlawfully, without lawful warrant or authority, and in bad faith, imprison and detain your petitioner, falsely pretending that your petitioner was guilty of the crime of perjury," causing damage, etc. The defendant pleaded the general issue and justification.

On the trial, the evidence for the plaintiff was, in brief, as follows: The plaintiff boarded in the defendant's house. About January 20th, she had a difficulty with one Annie Phillips, another girl who boarded in the house, which resulted in a fight. Plaintiff was arrested at the instance of Annie Phillips on two warrants, one for assault and bat-

y, the other a peace warrant. Being unable to give nd, she remained in jail till next day, when a bond was ren and she was released. Subsequently she pleaded ilty to the charge of assault and battery, and was fined 5.00. She preferred doing this to having the publicity a trial, although not guilty. After the difficulty with nnie Phillips, plaintiff went to another place to board. n January 21st, 1881, she returned to defendant's house pack and carry away her trunk. She was met by dendant, who ordered her to leave, and accused her of reatening to break up the furniture. This was denied her and affirmed by another boarder, resulting in a ight altercation. The defendant continued to order her pack up and leave; cursed and abused her, and threatned to "fire" her down the steps. On January 24th, e swore out two warrants against defendant, one for keepg a lewd house, and the other for committing a breach the peace. After doing this, she was advised by her ounsel, who, knowing from professional observation in ther cases the revengeful character of defendant and her evere treatment of her boarders who offended her, anticiated a counter-warrant, not to return home that night. he spent some time in the room of one Kaufman, over s bar-room, and then went to the office of her counsel, here she was arrested about six or seven o'clock, P. M., n a warrant sworn out by defendant, charging her with erjury in making the affidavit on which the peace warint was based. The affidavit and warrant under which nis last arrest was made were as follows:

"OFFICE OF W. H. WOODHOUSE.

TATE OF GEORGIA—Chatham county.

Before me, W. H. Woodhouse, in and for the county of Chatham, the state of Georgia, personally came and appeared Mary Thorpe, ho, being duly sworn, deposeth and saith, that to the best of depoent's knowledge and belief, Maud Wray, of said county, is guilty of the offense of perjury by falsely swearing before Waring Russell, a stice of the peace, that deponent 'threatened and abused Maud

Wray,' said affidavit being made to produce the arrest of deponent is said county, January 24th, 1881.

Sworn to and subscribed before me, at Savannah, county and state aforesaid, this the twenty-fourth day of January, A. D., 1881.

Mary Thorpe, W. H. Woodhouse.

"STATE OF GEORGIA—Chatham county.

To any Sheriff, Deputy Sheriff, Coroner, Constable, or Marshal of said State—Greeting:

You are commanded forthwith to apprehend the body of Maud Wray, charged with the offense of perjury, and to bring her before me, or some other judicial officer of this state, to answer the said complaint and to be further dealt with according to law. You will also levy on a sufficiency of property to satisfy the cost of this proceeding etc.

Given under my hand and seal, at Savannah, county and state afore said, this the twenty-fourth day of January, A. D., 1881.

W. H. WOODHOUSE, [L.S.]

J. P. —— county, Georgia.

Under this warrant plaintiff was arrested and carried before Woodhouse, the justice of the peace who issued it Kausman offered to go on her bond, but was refused, be cause his property consisted entirely of personalty. He offered to place in the hands of the arresting officer a cer tified bank check for the amount covered by his surety ship, but this was also refused. He subsequently obtained a satisfactory bondsman, and plaintiff was released after a detention of two or three hours. The condition of the bond was for plaintiff's appearance at the next term of Chatham superior court, to answer any indictment, etc In a few days after this her bondsman desired to release himself, and she was again arrested by a constable serving in the court of Naughton, another justice of the peace of Chatham county. Her counsel placed the warrant in the hands of the justice, he set a time for the hearing, had defendant (Thorpe) subpænaed, and notified her counsel At the time set for the hearing, no one appearing for the prosecution of the case, the statement of Maud Wray was

taken, and she was dismissed. She suffered much annoyance from this arrest. The other girls in the house did not like her because she made more money and had more privileges than they did. No one was present at the conversation between her and defendant which formed the basis of the peace warrant. Defendant's treatment of her boarders was very domineering, and was violent towards those who displeased her.

The evidence for the defendant was, in brief, as follows: She and several of her witnesses, who stated that they were present at the interview of January 21st, 1881, denied any violence on her part, and set up that plaintiff had been drinking and had beaten Annie Phillips badly, and threatened to break some of defendant's furniture (as one of the boarders reported), and that on the 21st of January, when she came in, defendant instructed her to pack up and leave, and sent out after a constable, who was present during a portion of the time when plaintiff was packing. There was much testimony from defendant and her boarders tending to impeach the plaintiff. It also appeared that she swore out the warrant for perjury under the advice of counsel; that the affidavit was sworn to before Woodhouse, who was a justice of the peace in Chatham county, and was by him attested and the warrant issued; but he omitted to attest the affidavit with his official signature. At the time of the hearing before Justice Naughton defendant (Thorpe) was sick and could not attend: and her counsel also advised her that Naughton had no jurisdiction of the case.

As to the feelings which prompted the suing out of the warrants and counter-warrants between the parties, the evidence was neither lucid nor consistent; but it was quite evident that each party desired to give the other trouble.

The jury found for the plaintiff \$755.00. Defendant moved for a new trial on the following among other grounds:

- (1.) Because the court overrnled the motion for a non-suit made by the defendant.
- (2.) (3.) (4.) Because the verdict is contrary to law and evidence and is excessive.
- (5.) Because of the newly discovered testimony of two witnesses. [The affidavits attached to this ground show that the object of the newly discovered testimony was the impeachment of the witnesses for the plaintiff.]
- (6.) Because the court erred in overruling the objection of defendant to the admission of plaintiff's answer to the question put by her counsel, whether she had not been arrested a second time on the same warrant after she had given bond.
- (7.) (8.) Because the court erred in ruling that the plaintiff could not be compelled to answer the question whether she was not an inmate of a house of prostitution at the time the warrant was sued out, plaintiff stating that it would bring disgrace upon her.
- (9.) Because the court erred in overruling the objection of defendant to the plaintiff's stating her reason for pleading guilty to the offence of assault and battery, and in admitting said evidence both in the direct and re-direct evidence of said witness. [The court certified that the fact that plaintiff pleaded guilty was drawn out by counsel for the defendant, and the cause of the plea was allowed to be shown in rebuttal.]
- (10.) Because the court erred in admitting the evidence of Kaufman, a witness for plaintiff, as to the offers of said witness to become security for plaintiff at the time of arrest, and to the efforts of Mr. Russell (her counsel) to have the bail reduced, defendant objecting upon the ground that she was not responsible for the acts of the officer after the arrest.
- (II.) Because the court erred in ruling in the presence of the jury in the language following: "All sufferings of the plaintiff may be considered as part of the damages, when they are the natural result of the taking out of the

warrant." [The court certified that no formal ruling was made on the point, but that he considered this a correct statement of the law.]

- (12.) Because the court erred in admitting the evidence of Russell as to how many warrants were issued against the plaintiff at the instance of the defendant, the defendant objecting to the admission of the evidence. [The witness stated that there was only this one that he knew of.]
- (13.) Because the court erred in admitting the evidence of said witness as to the offers of Kaufman made to the constable to become security for appearance of plaintiff, over the objection of defendant that she was not responsible for the acts of the officer.
- (14.) Because the court erred in refusing to allow an amendment of the affidavit on which the warrant for perjury was based, by the addition of the letters or words denoting his office to the signature of the officer, he being then in court ready to testify that he had taken said affidavit as a justice of the peace, and through inadvertence failed to attest said affidavit officially.
- (15.) Because the court refused the motion for a nonsuit made by the defendant after the close of the plaintiff's evidence, upon the ground that the evidence proving that the arrest and detention were by virtue of a warrant, the action of trespass for false imprisonment would not lie and case was the remedy.
- (16.) Because the court erred in deciding that the warrant upon which the arrest was made was void, because it did not contain the recital that said warrant issued on oath or affirmation.
- (17.) Because the court erred in refusing the motion of defendant to have the witnesses for the plaintiff excluded from hearing the evidence of defendant and her witnesses after the witnesses for the defendant had been so excluded. [The court certified that defendant's counsel made this motion after plaintiff closed, and that no witness was afterwards introduced for the plaintiff.]

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(18.) (19.) (20.) (21.) (22.) Because the court erred in admitting the evidence of plaintiff over the objection of defendant as to the manner in which defendant treated her boarders, especially when they attempted to leave her house. [The court certified that the defendant first introduced evidence concerning her manner of treating her boarders, and this evidence was introduced in rebuttal.] The motion was overruled, and defendant excepted.

J. J. ABRAMS; LESTER & RAVENEL, for plaintiff in error.

A. P. & S. B. ADAMS, for defendant.

SPEER, Justice.

This was an action of trespass for false imprisonment, brought by the defendant in error against the plaintiff in error, in which a recovery was had in favor of the plaintiff below in the sum of seven hundred and fifty-five dollars. A motion was made for a new trial, which was refused, and that judgment is the error assigned.

It appears from the evidence, that Maud Wray sued out a warrant against Mary Thorpe "to compel her to give bond to keep the peace." That immediately after her arrest on said warrant, Mary Thorpe sued out a warrant against Maud Wray charging her with perjury in suing out the peace warrant; upon this warrant Maud Wray was arrested, and it was in consequence of her arrest and imprisonment under said warrant this action of trespass was filed.

1, 2. The first error assigned in the motion for new trial was error in the court refusing to non-suit the case.

The ground of the motion for non-suit was, "it having been proved that the arrest and detention of the plaintiff was by virtue of a warrant, the action of trespass for false imprisonment, would not lie, but case was the remedy, and plaintiff had not shown any bad faith on the part of defendant."

We agree with the court below, that the motion for non-suit should not have been allowed. The warrant under which this arrest of plaintiff below was had was defective and void.

There was no sufficient affidavit upon which it could issue. It did not appear to have been sworn to before any officer authorized to administer an oath, but was attested and signed by W. H. Woodhouse and the defendant below, Mary Thorpe. Neither the affidavit or warrant either literally or substantially complied with the form prescribed by law. Code, §4714-15; Constitution article 1, section 1, par. XVI; 55 Ga., 380.

This warrant was not supported either by oath or affirmation, nor did it allege when or where the crime was committed. Code, §4714.

The warrant being void, the arrest and imprisonment were illegal, if made in bad faith. "False imprisonment consists in the unlawful detention of the person of another for any length of time whereby he is deprived of his personal liberty." Code, §2990.

"But, though the imprisonment be had under a warrant defective in form or void for want of jurisdiction, neither the party bona fide suing it out, nor the officer who in good faith executes the same, would be liable for false imprisonment; but in such cases the good faith must be determined by the circumstances of each case." Code, §2991. The conclusion, then, is irresistible, that if the party who sues out the warrant acts in bad faith, the detention is unlawful, and he is liable to an action. The question of good or bad faith being a question of fact for the jury, the court did not err in refusing to non-suit the case. Code, §4460; 52 Ga., 244; 50 Ib., 591.

The warrant being void the action of trepass for false imprisonment was properly brought. Code, §§2990-1, 4364; 3 Wait, 307; §. 4, *Ib.*, 319, §13.

3. The court having given in charge to the jury the principles above recognized, we do not think the verdict

is either contrary to the charge or to law. Neither are we prepared to say the verdict found by the jury is excessive.

"The question of damages being one for the jury, the court should not interfere, unless the damages are either so small or so excessive as to justify the inference of gross mistake or undue bias." Code, §2947; 10 Ga., 37; 20 Ib., 428; 23 Ib., 222; 42 Ib., 270.

The question of damages being one peculiarly for the jury, and the legal principles controlling the question being properly given in charge, we do not feel authorized to interfere with the verdict on this ground. Code, §§3066, 3067.

- 4. The newly discovered testimony would only be admissible with a view of impeaching the testimony of the plaintiff below, and is not favored or sufficient to set aside a verdict, especially when the newly discovered testimony is likewise merely cumulative in its character. 56 Ga., 403; Code, §3716.
- 5. We see no error in the court overruling the objection made to the testimony of plaintiff detailing the facts of her second arrest under the same warrant at defendant's instance. It goes to illustrate the question of good faith on the part of the defendant below in having this arrest made in the first instance.
- 6. Neither was there error in the court refusing to compel the witness (the plaintiff) to answer "whether she had been an inmate of a house of prostitution, when she refused to do so on the ground that it would disgrace her." Code, §3814.

The eighth ground of the motion is overruled for the same reason, that it is the privilege of the witness to decline to answer.

7. Neither was there error in allowing the witness to testify as to the reasons that impelled her to plead guilty to the charge of assault and battery. All the evidence on this subject had been brought out by the defendant below, to affect the character and credit of the plaintiff,

I it was just she should be allowed to say why she had aded guilty to the charge, in reply to the testimony proed from her by the cross-examination of defendant's insel.

- The testimony of the witness, Kaufman, who testias to the circumstances attending the arrest and imconment of the plaintiff, with her efforts at procuring l, etc., we think was admissible as part of the res gestæ. also, as to the testimony of other witnesses testifying similar facts and occurrences.
- Neither do we find any error as complained of in the h, 14th, 15th, 16th, 17th grounds of the motion.
- o. As to the 18th, 19th, 20th, 21st and 22d grounds, are of the same effect; the rulings of the court as to se grounds are not so authenticated by the judge below o warrant us in considering them as they are presented he motion. As to the admissibility of the evidence wing how the defendant treated her boarders, it seems as first offered by the defendant and admitted without ection, and afterwards the court allowed evidence in ittal of this to disprove its truth. We do not think was error, since the defendant tendered the issue as er character of being a kind and considerate landlady, has no cause to complain if the issue was met by coning testimony. If she was seeking character and credit naintain her defence by this testimony it was competo rebut it. In looking carefully through this volumis record, we find no such error of law as would justify n interfering with a verdict that is sustained by the lence, and which has met the approval of the judge presided in the court below.
- As to the point that the evidence does not show the prosecution of this warrant for perjury against defendant in error had finally ended and terminated, do not see from the record that this question was made he court below. But as it was insisted upon here, we that we are not prepared to determine that there is

not sufficient evidence in the record to show that the prosecution had ended. There was an appearance by the defendant before the magistrate for an investigation. The prosecutrix (plaintiff in error) was duly notified of the time and place, and failed to appear, and the magistrate, after hearing the statement of the defendant, dismissed the warrant. Moreover, we are inclined to think that the rule as requiring that the prosecution should be ended before the civil suit was maintainable, applies alone to suits for malicious prosecution and not to suits for trespass. See Code §2989.

Judgment affirmed.

# GIBSON et al. vs. HARDAWAY et al.

A testator made the following bequest: "I give and bequeath to my daughters, Dora W. and Martha O. Hardaway, the tract of land or which I now reside (describing it), and also another tract of land (describing it). Both tracts together I value at \$11,000.00. I also give to each of my two daughters one bedstead, bed and bed furniture, which will be four hundred dollars each, more than I have given to my son, Wm. M. Hardaway; and, as I wish to (make) them all three equal, I direct my executors to pay over to my son Wm. M. Hardaway, four hundred dollars from other parts of my estate. I give the above named legacies to my daughters free from the debts, liabilities, or control of any husband they may have; and should either or both of my two daughters above named die without child or children, then all the legacies given them in this item shall vest in and be considered as my estate: "

Held, that the words in the above item do not create an estate tail in the two daughters, but convey a fee simple estate to them defeasible upon their dying without child or children; that such is the intention of the testator, as gathered from the above item, and nothing inconsistent therewith appearing elsewhere in the entire will, the construction thereof by the court below is right.

Wills. Estates. Legacies. Before Judge POTTLE. Warren County. At Chambers, December 1, 1881.

# E. C. Hardaway died, leaving the following will:

## "STATE OF GEORGIA-Warren County:

In the name of God, Amen, I, Edw. Cody Hardaway, considering the uncertainty of mortal life, and being of sound mind and memory, deem it right and proper, both as regards myself and family, that I shall make a disposition of the estate with which a kind Providence has blessed me, do therefore make this my last will and testament, hereby revoking all others heretofore made by me, and divided as item six of this will directs.

Item first—I direct that my body be buried in a Christianlike manner, suitable to my circumstances in life and condition, at the place where I now reside, where my wife is inferred; my soul I trust shall return to God who gave it, as I hope for eternal salvation through the merits and atonement of a blessed Lord and Savior Jesus Christ, whose religion I believe.

Item second—I will that all my just debts be paid by my executors, hereafter named.

Item third—I give George T. McCord in trust for his two children, Eve McCord and Clennard Hardaway McCord, my grandchildren by my deceased daughter, Mary V. McCord, wife of George T. McCord, seventeen hundred dollars in a note which I hold against him, which he is to invest in lands, or some good bonds or stocks, for the sole use of the children above named. I also give to my two grandchildren before named thirty shares of Georgia Railroad stock, which I wish my executors to divide equally between them, when either of them marry or become of age. If either of them should die without child or children, then all I give in this item shall go to and be the property of the one living, or to the descendants of the one living. Should both of them die without child or children, then all I give in this item shall revert back to and become a part of my estate.

Item fourth—I give and bequeath to my son, William Mark Hardaway, five thousand one hundred dollars, and also one bedstead, bed and furniture, which I have heretofore advanced him and for which I have his receipt, and that shall be considered as a portion of his part of my estate advanced to him.

Item fifth—I give and bequeath to my daughters, Dora W. Hardaway and Martha Ophelia Hardaway, the tract of land on which I now reside, containing (673) six hundred and seventy-three acres, more or less; and also the tract of land formerly belonging to the estate of George W. Hardaway, in this county, containing (496) four hundred and ninety six acres, more or less. Both tracts of land together I value at (\$11,000) eleven thousand dollars. I also give to each of my

two daughters one bedstead, bed and bed furniture, which will be four hundred dollars each more than I have given to my son, William Mark Hardaway; and as I wish to them all three equal, I direct my executors to pay over to my son, William Mark Hardaway, four hundred dollars from other parts of my estate. I give the above named legacies to my daughters free from the debts, liabilities or control of any husband they may have, and should either or both of my two daughters above named die without child or children, then all the legacies given them in this item shall vest in and be considered as my estate.

Item sixth—It is my will that all the remaining parts of my property not before bequeathed in the foregoing items,—notes, accounts, household and kitchen furniture, horses, mules, cattle, hogs, and plantation tools, etc., shall be equally divided, or sold and proceeds equally divided between my son, William Mark Hardaway, and my two daughters, Dora W. and Martha Ophelia Hardaway. The devise in this item includes a tract of land in McDuffie county known as the McDuffie or Fleming tract of land, containing (172) one hundred and seventy-two acres, more or less. The money arising from the above mentioned sales, which will go to my daughters, shall be invested in lands, stocks or bonds by my executors or trustees, if have trustees, for their sole and separate use.

Item seventh—I will that one acre of land, where my wife and daughter and others are now interred, shall be reserved and held forever as family burying ground.

Item eighth—I appoint my son, William Mark Hardaway, and Marshall Wellborn, my executors to carry out and execute this will and testament. This will is written on two sheets of paper, attached together by a band of ribbon."

(Dated July 24, 1877, and regularly attested.)

Dora W. Hardaway intermarried with Gibson, and filed her bill for a construction of this will, and by amendment Martha Ophelia Neal (formerly Hardaway) became a party complainant. William M. Hardaway, and George T. McCord, as trustee and next friend of his minor children, Eve and Edmund, were defendants. The complainants claimed that the fifth item of the will sought to create an estate tail, and thereby an absolute fee simple title vested in them. The defendants insisted that complainants took a fee simple estate defeasible upon dying with-

out children. Judge Pottle, to whom the case was submitted, rendered the following decision:

"There is but one question in this case for the decision of the court, and that is the construction of the last will of Edmund Hardaway. Complainants invoke a construction, and the defendants, by a crossbill, do the same thing. On the part of the complainants, it is contended that by the will an absolute title to the two tracts of land desscribed in the 5th item vested in them, or in other words, that by the terms of said will an estate tail was created in the two daughters."

(The items of the will were then copied.)

"This is the whole will. This testament must be construed as a whole to get at the intention of the testator. It speaks for him though he is dead. His thoughts and intentions must be gathered from everything within the "four corners" of the instrument, and that intention must prevail unless it contravenes some rule of law. Do the words in the 5th item show an intention that the reversion should be dependent upon an indefinite failure of issue? It will be observed that there is no life estate created in the two daughters. The devise is to them absolutely, and if either or both of them die without child or children, then the reversion arises. There is no express estate given to the children in case there should be any. Now what title passed out of the testator? Most obviously a fee in the two daughters, to be divest-upon their dying without child or children. It is argued that the words child or children are synonymous with issue, and that the reversion only attaches upon an indefinite failure of issue.

This case opens up a wide field of investigation. The well is deep, but fortunately for us we have something to draw with. Great minds have dropped their buckets to the bottom, and have brought water of the best quality. It is true that some of it is not very clear, but there is an ample supply. Counsel in this case have displayed a commendable amount of industry and learning, and have afforded me great help in coming to a conclusion. It has been well said by the late Chief Justice of our own supreme court, that precedents and adjudicated cases are of but little use in such cases like this; they serve to bewilder and perplex. If a case could be found exactly similar, it would afford aid to the court; but that is impossible. We have seen that the devise was absolute in the two daughters, defeasible upon their dying without child or children. It is unlike the Wilde case, and unlike the case cited in 3d Kelly, and we have seen that there is no limitation over to the child or children. Whether or not an estate tail was intended, so that the fee should vest in the first taker, we must look to the time when the event is to happen. If the failure was to be at the death of

the first taker, no indefinite failure of issue can be supposed. in his excellent treatise on Perpetuities, says: 'There is not found any instance of property being given to a person in fee, limitation over in case he should die without leaving issue at the of his death, in which the previous fee has been cut down to an tail by force of the limitation over.' Page 153. It cannot be quest but that the primary meaning of the word child or children is im ate descendants or remote offspring, unless there are other words instrument requiring a different meaning. There are cases children have been held to mean remote descendants, but in cases there will be found other words enlarging their meaning. is unnecessary here to look into the meaning of the words. We back to the proposition as to the time when the limitation over take place; that event must determine the question of remote In Hughes vs. Sayre, P. W. R., this case is reported: having two nephews and nieces, A and B, devises his personal e to A and B, and if either die without children, then to the surv Held to be a good devise.

The chancellor gave judgment that the word children, when born, had been in a case of a will construed to be synonymous issue, and therefore would create an estate tail (Wilde's case, 6 C and if the word children was understood to be the same with iss the present case, then the devise of the personal estate upon a d without issue would be void; but here the words dying without dren must be taken to be children living at the death of the pe Page 534. But let us see if this inquiry cannot be solved by the w themselves: "Should either or both die without children, then the leg given them shall vest in my estate." To what period of time doe word "then" refer? It must mean, and can mean nothing else bu time when the daughters, or either, should die without child or chile He manifestly meant this: I give to my two daughters a fee simp this land, and when they die without any child or children living a death of the mother, that estate shall cease. Such was his dispos scheme. (See Roberts and Wife vs. West, 15 Ga., 123. See also case of Sanford vs. Sanford, 58 Ga., 259.) The word "then" as curs in that devise, and the meaning attached to it, is expressly mented on. Judge Bleckley says the word then as used in this w an adverb of time, and refers to 16 Ga., 557 and 617. In that Judge Bleckley draws the most obvious distinction between that and the case in 3 Kelly so much relied upon by counsel for the plainants. In that case, as he justly observes, the will coupled children with the ancestor directly. In the Brantly case (3d & the words were, "to William Brantly and his children," and in

of his death without having children, the property reverted, 3 Kelly. The act of 1853-4 seems to decide the question as to the time when the limitation over begins. Suppose the words "without child or children" should be construed to mean without issue, etc. This act provides that such limitations or terms shall be held and construed to mean a definite failure of issue; that is to say, a failure of issue or heirs at the time of the death of the first taker. This act is a pretty close transcript from the act of 1st Victoria. In commenting on that, Lewis on Perpetuities, says: "Words imparting a failure of issue are by the new law to be construed to mean a failure of issue in the life time, or at the death of such person, unless a contrary intention appears," etc. Estates tail being prohibited by our law, none is raised by implication, and courts cannot presume that a testator intended to violate that law. Are there any words or clauses in this will to be taken in connection with item 5 which go to show that the testator meant to give his property to a class which has succession from generation to generation till the blood is exhausted? Under the rule in Shelly's case that would be an express entail. Counsel for complainants refer to item 3d as supporting words. These words refer to the legacies given to his grandchildren. In that item he made cross remainders in favor of the survivor, in case of death without children, or to the descendants of children. I cannot see how that throws any light on what comes after; and if they did the words "descendants of children" are qualified by the succeeding words, and then "the adverb of time" shows the time when the limitation over was to take effect, or rather the reversion takes effect. In Burton vs. Black, 30 Ga., page 640. Judge Stephens, who delivered the vigorous opinion of the court. said great care should be taken in adhering strictly to the description of the persons who are to prevent the property from going over. Now can there be any doubt as to who the persons were in this case who were to prevent the reversion? The class of persons are child or children then living at the death of the daughters. If such a class is not in issue at that time, then the reversion begins. It may be, and likely it would be held, that grandchildren would answer the description of children for the purpose of preventing reversion, but that assumption does not affect the question as to the time when the reversion begins. If the premise be correct that the children were the class which would prevent the reverter, and that the death of the daughters was the time when the estate should terminate, then it is immaterial who are the reversioners in fee. In this connection the case of O'Byrne is cited in 61 Ga. Reps. In that case it was decided that "lawful issue" meant children, and one reason given by the Chief Justice was that the limitation over was to certain persons named in the

will, and that the daughter took as purchaser and not by limitation. It will be again observed that the case before us is not one with a remainder over, but a case with a reversion upon the happening of certain contingency.

A case somewhat in point is the case of Doe, ex. dem., of King v Frost, reported in 3 B. & Adolphus, 546. A testator, having a so and daughter, and the latter having several children, devised to his so W. F. in fee, and if he should have no children or child or issue, the said estate was, on the decease of W. F. to become the property testator's heirs at law, subject to such legacies as W. F. might leave t the younger branches of the family. It was adjudged that W. I took under this will an estate in fee, with an executory devise over the person who, on the happening of the event contemplated in the will, should be the heir at law of the testator, and it seems that the charge upon the estate did not alter the construction of the words limitation. This was a case where no person was named, but who ever chanced to be the heir at law took the devise. An estate in r version is the residue of an estate, usually the fee left with the grant or his heirs after the determination of a particular estate, which has granted out of it. The rights of the reversioners are the same with those of a vested remainderman in fee. Code, §2263. By the will, on the happening of a contingency, namely, the death of t daughters without child or children, the property given them was vest in and be considered as his estate. There is no remainder over but the destruction of an estate in his daughters, at their death wit out children. For that purpose the title passed out of testator. T class of persons which he had in his mind were not a progeny, to ta ad infinitum, but such a class as should be his representatives wh this event happened, upon which the vesting depended, then t devise ended and the reversion began, the fee being still in the devis and his heirs, the rights of the reversioners being the same as a vest remainderman in fee. It would seem that if the grant were to cea at the death of the daughters without children, this property wou fall in the residuum of the estate, and pass under the residuary claus making the two daughters and W. M. Hardaway tenants in commo or there would be an intestacy as to that. Every conveyance shall construed to convey a fee unless a less estate is mentioned and limite Code, §2248. Here a fee is expressly created and a less estate is carv out at the death of the daughters, without child or children, vests. the language of the judge in King vs. Frost, in those who should ha pen to be the heirs at law; and the mind of the testator was eviden looking to his son or the grandchildren, who were the only other ch dren of his loins. The reversionary clause in this will negatives a

ught of a contemplated indefinite failure of issue in the daughters. scheme undoubtedly was to keep the property in the family. His dren were the objects of his bounty, and instead of looking down a remote period of time through successive generations of the blood his daughters, he resolved that when they died childless it should nain just as it did before the grant passed out of him. It is clear t he did not contemplate that it should pass with the residuary use, but such may be the legal effect. In Dillard vs. Ellington 57 ., the court say: 'When a reversion may be incident to a specific dee, the testator may be supposed not to have contemplated it; but en it must be incident, and cannot possibly be otherwise, the prenption should be that he had it in mind, and that language used by sufficiently comprehensive to dispose of it was used without that ent.' However, I only decide what the pleadings call on me to ide. I, therefore, order and decree that no estate tail was created this will, and that the estate of the two daughters, Dora W. and rtha Ophelia, as intended by the will, was a fee simple estate in the tracts of land, defeasible upon their dying without child or child-

To this decision complainants excepted.

SEABORN REESE; H. C. RONEY; GIBSON & BRANDT; AWKINS & HAWKINS, for plaintiffs in error.

W. D. TUTT; C. W. DUBOSE, for defendants.

CKSON, Chief Justice.

The decision in the syllabus, written out by myself, presses the judgment of the court on the item in the ll in controversy as clearly and succinctly as I am able make it. The entire will reported above contains nothing going to show any intention tending to create an estet tail, and the opinion of Judge Pottle, also reported, so full that it is deemed unnecessary to discuss the estion at issue further. It may be added that, by our stute, before an estate tail can be held to be created by y words in a will, those words must show such intention in the testator's mind very clearly—I had almost id beyond a reasonable doubt. The language of the

law is, "estates tail being illegal, the law will never presume or imply such an estate." Code, §2250. All implication is expressly excluded, and all argument based or any part of the will to raise an implication is without force. There is nothing in this will which would ever raise such an implication, so far as we can see. The bes that can be said for the word "then" is that it may prob ably mean "thereupon or in that event," as contended fo by plaintiffs in error; but it is also certain that it may mean "at the time" of the death of the daughter. Th latter meaning makes the will legal, the former illegal If therefore the intention in the use of the word wer doubtful, we should be forced to give it the legal mean ing to carry out the statute. But the natural, plain simple construction is that the "then" used here is a adverb of time, and means at the death of the daugh ters. Then, at that time, when "either or both of m said daughters above named die without child or chi dren, then all the legacies given them in this item sha vest in and be considered as my estate." Should either die leaving no child then the fee simple is defeated an the reversion takes place. So that the estate is a fee sin ple estate defeasible upon the daughter dying withou child or children.

Mark the difference between the third and fifth item of the will. In the third the language is, "should bot of them" (the grandchildren) "die without child or chidren, then all I give in this item shall revert back to an become a part of my estate," whereas in the fifth, the item immediately in review, the language is "should either or both," showing a remainder to the surviving grandchild in the third, without reference to the prior clause in the item, but none in this, the fifth item, to the surviving daughter.

The son named in the fourth item, is then, on the deat of either daughter, to share with the surviving sister and the grandchildren named in the third item also,

y or their representatives be alive; but not until both ldren die without any child of either surviving, are the er children of the testator to have any interest in that rd item.

The entire scheme seems clear to keep the property in blood of the testator just as long as the law will perty, but no longer. A time certain and within the it of the law is fixed when all conditions and continucies and defeasances cease, and the fee which passed the death of testator defeasible at a certain time benes fixed forever, either in some surviving descendant the death of the legatee, or by reversion into the testats heirs-at-law.

Be this as it may, it is enough to say that by this item estate tail passes, but an absolute fee, defeasible upon death of the daughters without child or children then viving.

udgment affirmed.

Cited for plaintiffs in error: Redfield on Wills, 20; 12, 47; Code, §§2248, 2301; I Jar. on Wills, 313, 323, 22 Williams on Exr's., 760, 711; 2 Jar., 179, 171, 183, 186, 231, 232; Redf. on Wills, 20, 15; 33 Ga., 179; 16., 640; 20 Ib., 811, 818; 30 Ib., 641; 58 Ib., 23; 3 562; 4 Ib., 383; 15 Ib., 125; 17 Ib., 285; 16 Ib., 557, 21 Ib., 380; 61 Ib., 77.

For defendants: 2 Blacks., 109, 110; Code, §§2250, 1; 3 Kelley, 551; 4 Kent, 9, 10; 30 Ga., 638, 707; 23 395; 1 Wash. on Real Estate, 78, 79; 20 Ga., 699; 8 Ib., ; 17 Ib., 280; 21 Ib., 377; 28 Ib., 378; 33 Ib., 341; le, §2395; 12 Ga., 357.

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Beazley et ux. vs. Reid et al.

# BEAZLEY et ux. vs. REID et al.

- Whether words declared on are libellous or not is a question for the jury. The court should not instruct them that the word declared on are libellous, unless where crime is distinctly charged if at all.
- 2. The verdict is supported by the evidence.

Charge of Court. Libel. Verdict. Before Judge POT TLE. Taliaferro Superior Court. February Term, 1881

A. G. Beazley and his wife, Emma, brought suit for libel in the superior court of Taliaferro county agains certain female defendants, members of the Ladies' Be nevolent Society, organized for the purpose of erect ing a fence around the public cemetery in the town o Crawfordville, of which society the plaintiff (Mrs. Beaz ley) was a member. The ground of the action was a pub lication by defendants concerning the plaintiff in the Democrat, a newspaper of said county. The language complained of in the declaration as libellous, togethe with the innuendoes, were as follows: "This is all that tool place on those two memorable occasions, the 8th and the 11th inst., the opinion of the poor, unfortunate lady (meaning the said Emma) to the contrary notwithstand ing. She may state most positively if she will, but the facts are against her. We have great curiosity to know what she means by 'middleman.' \* \* \* Leaving thi knotty question for the public to determine, merely re marking in passing \* \* \* she did bring bring wo on that society in being used by another as the monkey did the cat's paw. Hence that desultory and rambling letter to the church at its last conference, and the reason she now seeks to bring woe on the whole community by publishing to the world, over the signature of 'Member of Ladies' Benevolent Society,' an article abounding in glaring mistakes of facts, and perversions of truth fo which there is not the least justification.

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Beasley et ux. vs. Reid et al.

She (meaning the plaintiff, Emma,) seemed to labor fer the delusion that she was the society itself, and ld not distinguish between it and herself. She claimed exercised the right of giving complimentary suppers he hot suppers, to whom she pleased, including a box provisions to the crippled negro Ben, without consult-her lady associates. And it is questionable in the eds of some whether she gave away more than she stributed. She alone can answer. (Meaning thereby the plaintiff, Emma, unlawfully and willfully approated the property therein mentioned to her own use, hout consulting the owner of the same.)

We would gladly have retreated from this painful task, a stern sense of duty to ourselves and the public dends it, and we dare not shrink from it. Let no one nk that we have criticized with needless harshness the duct of this self-styled middleman. It was absolutely cessary to the proper vindication of truth on which we and. We extend to her (meaning the plaintiff) the comseration and pity for which her unfortunate condition loudly calls, and ask your readers to grant her that mpassion which they would cheerfully bestow on one to had lost half her mind because bereft of memory." The defendants put in a plea of justification.

On the trial, much conflicting evidence was introduced, lich it is unnecessary to set out in detail.

The jury brought in a verdict for the defendants. aintiffs moved for a new trial on the following grounds: (1.) Because the court charged the jury that he could tell them whether the words declared upon as libelies were libellous or not in law, and because, after reading to them from the Code the definition of libel, he left for them whether said words were libellous or not.

(2.) Because the verdict is contrary to law and the evince, and against the weight of the evidence.

The court overruled the motion and plaintiffs excepted.

JOHN W. HIXON; J. C. REID, for plaintiffs in error.

Beazley et ux. vs. Reid et al.

JAMES F. REID; W. D. TUTT, for defendants.

JACKSON, Chief Justice.

This case presents an unfortunate controversy arising among ladies, and we forbear to say aught about it except to rule the dry law of the case.

published were libellous. His language is "that he could not tell them whether the words declared upon were libellous or not in law;" and reading to them from the Code the definition of libel, he left it to them to say whether the words were libellous or not. On this statement of the court error is assigned here, the motion for a new trial being based thereon.

We think that the point is covered by the case of *Park* & Iverson vs. The Piedmont Insurance Company, 51 Ga., 510. In delivering the opinion of the court in that case, Justice Warner said: "Whether the language of the publication did or did not charge the plaintiffs with having embezzled the defendant's money, or whether it charges them with having fraudulently appropriated the defendant's money, were questions of fact for the jury to determine from the plain and unambiguous language of the publication itself, without any intimation or expression of opinion by the court as to what offense that publication charged against the plaintiffs, or whether it charged any offense against them. Whatever charge the publication did prove, the defendant alleged to be true, and was bound to prove the truth thereof at the trial, and that was the issue between the parties. The practical effect of these two requests to charge was to require the court to say to the jury what was the meaning and import of the language contained in the publication, instead of leaving that question to the jury, whose province it was to determine it without any intimation or expression of opinion by the court in relation thereto."

Beazley et ux. vs. Reid et al.

So in this case, it was the province of the jury to determine the meaning and import of the words published, without the expression or intimation of an opinion by the court. To have instructed them that the publication was libellous, would have been to express a positive and unequivocal opinion thereon, and to decide the entire case except the fact of publication and the quantum of damages.

We cannot say, therefore, that the court committed error in following the lead of the case in the 51st Ga., under our peculiar statutory guard on the subject of the avoidance by the court of expressing opinions on facts. In matters of slander and libel especially, while the court must pass upon the libellous nature of the words spoken or written on demurrer to the declaration, or the necessity of evidence to show actual damage, it is for the jury to determine what proof is sufficient to establish the libellous effect of the words spoken or written, except, if at all, where crime is distinctly charged. In a case like this and that in the fist, it is especially their province to pass on the publication, its nature, effect and the intention, malicious or otherwise, which inspired it. It will be noted, too, that the courts are disposed to relinquish their power to rule such cases so as to control the juries, and to leave these questions more exclusively to the juries. (See Judge Pottle's able opinion in the record.)

2. The question being for the jury and much evidence pro. and con. before them on the issues made, and the presiding judge having declined to set the verdict aside, under our well settled rule we decline also to disturb the verdict.

Judgment affirmed.

# THE ATLANTA AND CHARLOTTE AIR LINE RAILWA COMPANY vs. TANNER.

1. Where the contract for service as conductor on a railroad through different states is made at the terminus in one state wherein is the office of the company, and the injury to the conductor occurs i another state, on a suit for damages by the conductor, does the la of the place of the contract or of the place of the hurt govern the negligence charged being mainly the neglect of properly in specting the machinery of the train at the point where the con tract was made? Ouære.

2. Assuming that the law of the place of the hurt is the law of th case, the law of South Carolina, and not of Georgia, will be applie by the courts of Georgia to the cause when tried in this state, ex cept in so far as mere modes of procedure and matters of practic in court are concerned.

3. There being no statute reglating the rights of parties in such case in South Carolina, and the common law prevailing there, the court here, in a liberal spirit of comity, will apply the construction of th common law in that state by its highest judicial tribunal to the fact of the pending case. So applying the principles there decided t this case, the court below did not err to the prejudice of the plain tiff in error, and it cannot complain.

4. In all judicial proceedings in this state, facts are for the jury, and there being evidence enough to support the verdict, and the tru facts as found by the jury making a case recoverable under th common law as generally understood and ruled wherever that sys tem prevails, and not at variance with the latest adjudications in South Carolina, and the presiding judge having approved the find ing of the jury, our rule of practice in this state is that this cour will not interfere except in cases of abuse of discretion. In this case it has not been abused.

Laws. Comity of States. Damages. Railroads. Ver dicts. Before Judge HILLYER. Fulton Superior Court October Term, 1881.

Tanner brought suit against the Atlanta and Charlotte Air Line Railway Company. The declaration contained two counts, the first for an injury to one of plaintiff's legs the other for the loss of his leg. The latter was the count

relied on for a recovery. It alleged substantially as follows: On October 4th, 1879, plaintiff was engaged as conductor of a freight train on defendant's road. He was ordered to run close on schedule to Gaffney's, regardless of another train known as number 48. When the freight train reached Gaffney's the engineer pulled up, and plaintiff got off, but finding that the engineer was moving on without sending a flagman ahead, and being unable to stop him by calling to him, plaintiff started up the ladder on the side of a box car for the purpose of ringing the gong on the engine to stop the engineer. In ascending, he placed his foot either on a round of the ladder, or the place where a round should have been. The round was either already gone, or else so nearly broken off that it immediately gave way, precipitating him to the ground, and the train passed over his leg, crushing it and necessitating its amputation. It was dark at the time of the accident, and plaintiff could not have seen that the round of the ladder was broken; but the company could have discovered and remedied the defect before the car left Atlanta, the duty of inspecting cars before leaving the depot being separate and distinct from the service in which plaintiff was employed. Under the circumstances. at the time of the injury it would have been easier for plaintiff to have climbed the ladder than to have entered the cab, had the rounds of the ladder been in proper position. Plaintiff was employed by defendant to run as a conductor from Atlanta, Ga., to Central or Charlotte, S. C. The contract was made in Georgia; the injury occurred in South Carolina. (The injury was described as to its extent and results, the damages accruing, etc.)

To this action defendant filed a plea of the general issue, and certain special pleas as to the first count, which are not material here.

On the trial, the following facts were not contested: Tanner was a conductor on defendant's freight train. On the trip when the accident happened, he lest Atlanta

some minutes behind schedule time, owing to a delay in getting certain cars loaded with cotton. He was instructed to catch up and get on schedule time. Ordinaril this train would have met the passenger train from Char lotte at Cowpens, S. C., about 3 or 4 o'clock, A. M., but o arriving, Tanner and his engineer received a telegram from the trainmaster to run on to Gaffney's regardless of th passenger train; they accordingly ran to Gaffney's, Tai ner riding on the engine so as to communicate with th telegraph operator on arriving at Gaffney's. The cab be longing to that train had been broken in an accident, an on this trip a car formerly used as a baggage car was a tached instead of a cab. On arriving at Gaffney's, plai tiff stepped from the engine as it was running slowly, an started to wake up the telegraph operator, as he had bee instructed to do. Looking round, he saw the train mo ing on; he waved his lantern and halloed to stop it, be failing to attract attention, he started to climb up the side ladder of one of the box cars, which was just passir him, for the purpose of reaching the bell rope. In doir this, his foot did not strike a round of the ladder, and l fell; his leg was crushed and had to be amputated.

Plaintiff insisted, and introduced evidence to prove, the the round of the ladder was gone; that it was the dur of the defendant's car-inspector to have examined the car before it left Atlanta, and to have reported the defect; that he did make an examination, but told the plaintiff that his train was all right, and failed to report this defect to the company. Also, that from the appearance of the ladder and the manner of its construction, must have been broken before it left Atlanta. Plaintit testified also that before reaching Gaffney's he and the engineer agreed that while the former woke up the operator, the latter would send a flagman ahead; also, that at there was some cotton near the side track, the train should run in on the main track and then back on to the side track, thus avoiding danger from sparks from the engineer

was the fact that the engineer ran the train ahead witht sending out a flagman, which caused him to make the ort to climb upon the car.

Defendant insisted, and introduced testimony to show, at it had selected competent train-inspectors, who had amined this train, and that there was no defect in the on which the accident happened, or in its ladder, at nothing was in fact said about a flagman between sintiff and the engineer, and there was no necessity for adding one ahead before the train was backed on to the e-track at Gaffney's; that had plaintiff remained in his o instead of riding on the engine, the accident would thave occurred.

The evidence was very voluminous, and on many points afficting, especially as to the physical condition of the intiff before the accident; whether his leg was not so ak before as to have been the real cause of the fall; at plaintiff said about the cause of the injury at the le it occurred and afterward; the customs and orders the railroad in regard to the inspection of trains, their edules, places of meeting, the extent of damages reting from the injury, etc., which it is not necessary to ail here. It was conceded that no statute existed in ath Carolina regulating liability in such cases, and testony was introduced on both sides as to the construction given to the common law by the South Carolina arts.

The jury found for the plaintiff \$9,000.00.

Defendant moved for a new trial, on the following among er grounds:

- 1.) Because the court erred in refusing to give each of following requests to the jury:
- a.) "In cases of corporations, where the duties are disarged by servants, the sole duty of the corporation is select proper and competent persons, to furnish the vant with adequate materials and suitable means and sources for accomplishing the work. And the law pre-

sumes that the servants so appointed by the master were proper and competent persons to furnish, inspect and repair such appliances, in the absence of an allegation be plaintiff and proof that they were in fact incompetent and that the master knew they were incompetent, could have known it by the use of ordinary and reasonable diligence."

- (b.) "The plaintiff in this case cannot recover, if his is jury was occasioned by the fault of a fellow-servant—person under the same general control, and engaged the same common pursuit,—and this would include the inspector as well as the engineer, unless the proof show that the inspector, in addition to his duty of inspector had been clothed by the master with a duty which the matter was bound to discharge, in the matter of furnishing, in the inspection or repairing of machinery. And the burden is on the servant to show by proof that said of servant, by whose negligence he was injured, was in fact as to him, more than a fellow-servant, and in fact stock in the master's place."
- (c.) "If the defendant furnished competent inspector and caused the train in question to be inspected before left Atlanta, at the time in question, and if the inspect thus provided by the defendant, failed in said inspection to find a defective ladder on said train, the defendation would not be liable for any accident to the plaintiff from the absence of said ladder."
- (d.) "If the defendant provided an inspector who duty it was to find if there was a defect, such as the a sence of a round of a ladder on any of the cars in que tion, the defendant would not be liable, even if the is spector was negligent in the inspection of said train."
- (e.) "Defendant would not be liable for the negligen of the inspector in the matter of inspection of the cars the train in question."
- (f.) "If you believe, from the evidence, that the acdent to plaintiff was caused by the negligence of Kirham, the engineer, the plaintiff cannot recover."

- (g.) "In order for the plaintiff to recover, he must have been himself free from fault. And if you find that there was any negligence on his part, he cannot recover any thing, even though you believe the defendant was guilty of negligence, and even though you find the plaintiff's case was made out in every other point, he still cannot recover any thing, if you find there was the least degree of negligence or carelessness on his part, and in such event you should find for defendant."
- (2.) Because the verdict is contrary to law, evidence, justice and equity, the charge of the court, and is excessive.

The motion was overruled and defendant excepted.

HENRY HILLYER; L. J. WINN, for plaintiff in error.

HOKE SMITH, for defendant.

JACKSON, Chief Justice.

1. Many questions of interest arise in this case, and all of them have been discussed with rare research and distinguished ability by the counsel. One point presented by the learned counsel for defendant in error is new to us. and we shall leave it where he placed it, in the form of a query, because it is unnecessary to decide, as other points, in our judgment, control the case in favor of defendant in The bodily hurt for which damage is sought was inflicted in the state of South Carolina, but the contract by which Tanner, an employé of the company, was hired as conductor of the train was made in Atlanta, Georgia, and the negligence of the company on which mainly he relies for a recovery, also was omission of duty in Atlanta by the company, in failing properly to inspect the machinery of the train. In such case, does the law of the place of the actual injury to the person suing prevail, or the law of the place of the contract and of the prior negligence, which was the real, or at least the prominent rea-

son of the injury? We leave it undecided, because whether the law of South Carolina or of Georgia be a plied to the facts made in the record, the result must be the same. On this point, without reference to the fa that the real negligence occurred in Georgia, see Hutchiso on Carriers, 143-4, and Dyke vs. Erie Railroad Compan 45 N. Y., 103, cited by defendant in error, and 49th Ga 107, and Story's Confl. of Laws (6th ed.), 307, cited b plaintiff in error. It will be observed that the case in 490 Ga., does not cover the point made here, for it does no appear in that case where the suitor's husband was er ployed, nor that the injury was caused by negligence this state; but the question here, for the reason above stated, is left open, with the remark, for which alone I as responsible, that the position of defendant in error, unde the particular facts here made, strikes the mind with great

- 2. Assuming then that the law of South Carolina governs, the question arises, first, what laws of that state wigovern here? The answer is to be found in the case cite above from the 49th Ga., 107, where it is held that to determine what are the rights of the parties the law of Alabama was the guide, but as to the mode of procedure t ascertain those rights, the laws of this state alone shoul be applied.
- 3. What then are the rights of the parties under the South Carolina law? No state regulating their rights have been cited, and it is conceded that none exists. The common law must, therefore, be considered the law of the state. What is the common law on the subject matter of the rights of the parties here, in this case, under the fact disclosed by this record, and reported at the head of the opinion? Shall the common law, as we understand it is Georgia, be applied, or the common law as interprete and adjudicated by the courts of South Carolina prevail In a liberal spirit of comity, without considering whether the adjudications there would harmonize with the view

of this court on what is the common law on the facts here made, we shall apply the construction of that law by the courts of our sister state to the facts here, and thus ascertain the common law prevailing in South Carolina and apply it as the law of South Carolina, so as to give it full force, as there understood and ruled by its highest court, to determine the legal rights of the parties in this case. The common law in respect to the liability of the master to the servant, as ruled in South Carolina, is to be found in 1st McMullan, 385; 15 Rich., 201; 8th *Ib.*, 173, and the case of Gunter 13. The Graniteville Manufacturing Company, not yet reported, but a transcript of which, duly certified and agreed as correct, is before us.

That being the last adjudication of the law applicable in South Carolina, where this injury occurred, is the rule of law governing the facts here, and eliciting out of those facts the rights of these parties. It is there decided that a recovery may be had if the injury "resulted from defective instruments or machinery with which the employé is furnished to do his work." And in that case the court further held that "the liability of the employer for defective machinery does not depend on the fact that the defects are latent and unknown, but it depends on the question of proper care in selecting this machinery, and in keeping it in repair;" and in summing up and laying down the rule of law, the court further decides that, "the rule of law is the one adopted—a medium line which holds the employer responsible for that part of the work, which falls to him either personally or through his agent, i. e., the proper selection and superintendence both of his operatives and his machinery. He is a guarantor that all reasonable and proper care shall be exercised in the performance of these duties, and his liability should be limited to a failure to meet his obligations in this respect."

Squaring this case by this rule of law, the question is, was the plaintiff in error hurt by the charge of the court?

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The fact on which the defendant in error relied for recovery mainly, is that the officer of the company, Johnson, whose duty it was to inspect the cars, its machinery, and especially the fixed ladder by which the top of the car was reached, neglected his duty, and that the latter was defective, and its defect caused the fall of the conductor and his injury from the train. The charge of the court was to the effect that if Johnson was a head officer of one department of the road-to-wit, that of inspecting cars and machinery to see that all was right before starting, and that this inspection duty or office was devolved on a head officer as a branch of business distinct from that of conductor, and if the defect could not have been as easily discovered by the conductor—if he did not have as good opportunity of doing so, and his failure to discover it was not his fault, if it was of a kind he could not have seen and ought not to have seen, and therefore used the defective ladder without fault himself, then he could recover: if the truth was otherwise on any of these points of facts, then he could not recover. And further, even if the ladder were defective, and he was ignorant of the defect without fault, still if he could have avoided the injury by the use of ordinary diligence, then he could not recover.

This charge of Judge Hillyer certainly does not approach the rule laid down by the South Carolina court in the case of Gunter vs. The Graniteville Manufacturing Company in extent and compass against the employer, and the plaintiff in error, the employer here, has not been injured thereby, and therefore it cannot complain. For, under the rule laid down in that case, if this machinery was defective—and the ladder by which it is the servant's duty to ascend the car is part of the machinery of the train—then, it being the duty of the employer to select and superintend it—he being a guarantor of its having been properly inspected and superintended—then the employé could recover, if without fault himself. It is clear,

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refore, that if error was committed, it was not to the judice of the plaintiff in error, and he was not damed by the charge or the refusal to charge.

In all judicial proceedings in this state—in the mode procedure to ascertain the rights of parties here—the tlement of controverted facts is for the jury; and unthe rule laid down in the 49th Ga., p. 107, in the case The Selma, Rome and Dalton Railroad Company vs. cy, the law of this State will be applied to its mode of cedure to arrive at the true facts. Under the charge the court, the jury found the facts to be as contended by the employé—the defendant in error, and the preing judge having approved that finding, it must stand, there is no abuse of discretion anywhere on his part. Judgment affirmed.

Cited for plaintiff in error: 50 Ga., 251: 49 Ib., 107; 15 349; 30 Ib., 146; 62 Ib., 241; 64 Ib., 696; Story's Confl. ws (6th ed.) 307; Pierce on Railroads, p. 360; 15 Rich, 1; Pierce on Railroads, p. 361, 365; 100 U. S. R., 214; erce, 371, 373; Wood Mas. and Svt. 766, 770, 784, 786, 8, 800, 801, 802, 811, 821, 825, 693, 744; 46 Mo., 16; 2 n., 477; 20 Md., 212; 25 Ib, 462; Perry vs., Cent. R. Co., 66 Ga., 746.

For defendant: Hutch. on Carriers, 143-4; 45 N. Y., 103; McMullan, S. C., R., 385; 15 Rich., 201; 8 Rich., 173; Inter vs. Graniteville Man. Co., S. C. case not yet rered; 10 Peters, 18; 10 Otto, 226, 221-2, 213, 218, 219; Ill., 302; 2 Thomp. on Neg., 981, 984; Cooley on orts. 557, 561; 2 S. L. R., 123; Wood on Mas. and Svt., 7, 781; Add. on Torts., 603, note 1; Wharton on Neg., 2, 232; 73 N. Y., 38; 8 All. 441; 53 N. Y., 549; 80 N. Y., 29 Ark., 97; 110 Mass., 240; 46 Mo., 163, 59 Ib., 5; 55 Ill., 492; 53 Iowa, 595; 3 H. and C. 511; 16 Q., 332; Pierce on R. R., 379; 10 Gray, 274; 34 N. J., 151; 30 Ga., 146; 1 Ib., 195; 30 Ib., 151; 48 Ib., 9; 51 Ib., 583, 644; 58 Ib., 107.

## STAFFORD vs. HIGHTOWER.

- A judgment of the judge of the superior court granting or refusing an order for the removal of a cause to the circuit court of the United States may be brought to this court for review by bill of exceptions.
- 2. An application for removal of a cause to the United States court under the act of congress of 1875 need not show that the applicant was a non-resident at the time when the suit began; it is sufficient that he was a non-resident at the date of the application for removal.
- 3. It was sufficient for the application for removal to show that the plaintiff was a citizen of Alabama and the defendant of the southern district of Georgia. It was not necessary to show of which sub-division of the southern district he was a citizen.
- (a.) If this were necessary, an allegation that the defendant resided in a certain county of the southern district would be sufficient. The courts would take judicial cognizance in which sub-division that county was included.
- 4. Although an appeal may lie from an inferior to a superior court, yet if the former has jurisdiction to render a full and final judgment in the case, an application for removal to the United States court, under the act of congress of 1875, on the ground that the controversy was between citizens of different states, must be made at or before the first term of the inferior court at which a trial could have been had.
- (a.) A court of ordinary has jurisdiction to render a full and final judgment on a citation for final settlement by a guardian; and after trial in such court, and appeal to the superior court, an application for removal to the circuit court of the United States under the act of 1875 came too late.

Removal to United States Courts. Practice in Supreme Court. Pleadings. Courts. Before Judge STEWART. Pike Superior Court. October Term, 1881.

Reported in the decision.

JOHN I. HALL; J. A. HUNT; J. J. ROGERS, for plaintiff in error.

J. F. REDDING; W. S. WHITAKER; W. R. TAYLOR, defendant.

CKSON, Chief Justice.

This was an application to remove a cause from the perior court of Pike county, under the act of congress 1875. The case was pending on appeal from the court ordinary where judgment had been had thereon, and m which judgment the appeal to the superior court s made. The court below granted the prayer for reveal, and the defendant excepted.

1. It is insisted that from the judgment of the court low granting the order to remove the cause no writ of or will lie to this court, for the reason that the act proles that upon the filing of the proper petition and the er of good and sufficient surety or bond "it shall be e duty of the state court to accept said petition and nd, and proceed no further in the suit against the petiner for removal." The idea is that, as the state court to "proceed no further in the suit," it cannot sign and tify any bill of exceptions to this court, and hence ere can be no writ of error and review of the judgment re. Whatever may be the rulings elsewhere, and there authority to the effect claimed in other state courts and cuit courts of the United States, the question is not an en one with us, and until decided by the supreme court the United States adversely to the ruling in this court, at ruling will be adhered to, and we shall review the ion of the superior courts on questions of removal as other questions of jurisdiction. 59 Ga., 17; 60 Ib., 423. Whilst a recent decision of the supreme court of the nited States may bear incidentally on this question, it es not determine it and is not inconsistent with the rewing power of this court. I allude to Kern vs. Huideper, decided at the October term, 1880. Central Law urnal, Vol. 13, No. 9, p. 169.

2. Nor is the question hardly an open one with us that under the act of 1875 it is sufficient that the applicant in the petition allege that he is a citizen of another state at the time of the application for removal, and need not set out that he was such when the suit began. 60 Ga. 423.

In the view we shall present of another point in this case, it is not necessary, however, to repeat our adherence to that ruling, or to question it here, as the case is made to turn on another point. It seems settled, nevertheless, by high authority that our decisions are generally approved on the point. See Dillon on Removal of Causes, §72.

- 3. It is enough that the application shows that the parties are respectively citizens of different states—the plaintiff of Alabama and the defendant of Georgia, and resident in the southern district of Georgia. It need not allege that the defendant is a resident of one of the two divisions of the southern district of Georgia and specify that one wherein he does reside, if it were, the act of congress dividing the district puts Pike county in the western division, and that would be enough, for this court would take judicial notice of that public act.
- 4. We think, however, that the plaintiff is too late in making his application. The case had been tried in the court of ordinary, and the removal should have been applied for before or at the term at which such cause could be "first tried, and before the trial thereof." Such are the words of the act, and such the construction put thereon. See Dillon on Removal, §64, and cases cited in the note on page 79.

This case arose on a citation to the defendant to appear before the court of ordinary for final settlement of accounts under the Code, section 1839. In such a case, the powers of the court over the case are as complete as those of any other court in the state. The jurisdiction is concurrent with that in equity over similar matters, over the very same matters. Section 1841 provides that "the

shall proceed to examine all the returns and accounts ich guardian, to hear all evidence which may be produced by either party, and to make a full, fair and final ement between such guardian and his ward, making record of such final settlement." The next section ides for continuances; and the next for such other eedings as are usual "in said court."

ction 1844 provides for the delivery of property from dian to the ward, or to the new guardian, and to issue ution for balance in money.

ction 1845 provides that the court may attach for conor and imprison the guardian to enforce the delivery he property. Under these provisions the trial was and the case resulted in a judgment fixing the amount he recovery; and after all this, the appeal to the supecourt was made, and then, and not till then, was the tion for removal made.

a similar case, the principle covering the case here ruled and applied by the supreme court of the Uni-States. 13th Otto, 606. In that case a trial had been in the court of common pleas, which could have been aled to the district court of that state, and it was that the petition to remove should have been made re the first trial therein, that is, in the common pleas, d have been had. Thus it was ruled that where an eal lay from an inferior court in that state to the discourt of that state, Ohio, removal could be made to United States circuit court, and must be made before first trial in that inferior court.

here, on this matter, the court of ordinary is an infecourt to the superior court, to which an appeal lay, before trial in that court, the court of ordinary, bethe first trial therein, this application should have made.

e think, then, that this case brought in the court of nary, is such a one as could be returned on a timely tion therefor, and could have been removed from that

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court. If it could not have been removed from that co it is hard to see how it could be on appeal from the si rior court. For it is carried up in toto; it does not ! its character; no additional pleadings are necessary; the only difference is that in the superior court the j will pass on the facts under the supervision of the jud unless it be agreed that the judge try the case withou jury, while in the court of ordinary the judge of that co passes necessarily on facts as well as law, no juries be summoned therein for any purpose. But just as full trial is had and as complete and final adjudication can had in the one as in the other; and it is as much a tr in a court having jurisdiction of subject matter and p sons in the one as in the other. That such a case in su a court may be renewed, see Dillon on Rem., p. 53, no 1, and cases cited; especially 18th Howard, 137, where special statutory proceeding in the nature of a chance remedy, was held to be removable, and a suit in the sta court of Louisiana to annul a will and to recall the deci by which it was admitted to probate. 2d Otto, 10.

We think, however, that inasmuch as final judgme and execution could have been had on the trial in to court of ordinary, and as complete a trial on the mer was had therein as could be had in any court, that the application to remove after this trial, no matter where to case then was pending, came too late, and on this growthe judgment is reversed.

Judgment reversed.

## LEWIS, executor, vs. ALLEN, administrator.

I. While a verdict should express the principal and interest found it separately, yet where suit was brought on an open account, at the matters in controversy involved Confederate transactions, at an alleged settlement, set up by equitable plea, and the verdict w for a single sum less than the principal of the account, the presumption is that no interest was found.

 Where a guardian contracted a debt for the board of his ward and a suit was brought against him therefore, upon his death pen his executor could be made a party in his stead. Lewis, executor, vs. Allen, administrator.

If he was not a proper party, it should have been set up as a defence to a *scire facias* to make parties; after he had been formally made a party, the point could not be raised by demurrer to the action at a subsequent term of court.

The verdict is supported by the evidence.

The returns of a guardian are only prima facie evidence for or against him.

Guardian and Ward. Administrators and Executors. rties. Judgments. Evidence. Verdict. Before Judge AWSON. Jasper Superior Court. October Term, 1881.

Reported in the decision.

KEY & PRESTON; JACKSON & KING, for plaintiff in ror.

G. T. & C. L. BARTLETT, for defendant.

RAWFORD, Justice.

B. T. Digby, being the guardian of W. W., Martha and adrew J. Allen, was sued by Eliza Allen, their mother, their board. Before the trial Digby died and James Lewis, his executor, was made a party defendant in stead. Mrs. Allen, the plaintiff, also died, and W. W. llen, her administrator, was made the party plaintiff.

The defendant, Lewis, pleaded the general issue; that e suit was brought originally against his testator as ardian, and that his executor is not liable; that the id Digby had fully settled and paid over to the said W. Allen all the effects that ever came into his hands; at he had had a full settlement with him for the maters of trust as guardian that were in his hands, and was erefore not indebted any thing.

The plaintiff amended his declaration and alleged the e under an order of court of sufficient of the corpus of e estate of the wards to pay the debt sued, but that the d Digby, though he sold the land, had failed to pay er the said money so due.



# SUPREME COURT OF GEORGIA.

Lewis, executor, vs. Alien, administrator.

On the trial of the case the jury found a verdict for t sum of \$426.08 in favor of the plaintiff.

The verdict being for the said sum, the defendant move to arrest the judgment upon the ground that the verd should have been found for so much principal and much interest, as required by law. The motion to arrewas overruled, and this decision is the first error assigned

- I. That the law requires the principal and interest be found separately is undoubted; but where the desued for is upon open account and for a larger amouthan was found by the jury, and the matters in cont versy in the suit involved Confederate transactions, a an alleged settlement under an equitable plea, the p sumption is that there was no interest included in finding.
- 2. The defendant also moved for a new trial upon seral grounds, the first of which was that the court errin holding that J. T. Lewis, the executor of Digby, to former guardian, was a proper party defendant to this su when he was not the successor of the said Digby as guidian of the said minors.

This suit was brought by the original plaintiff againg the deceased defendant to recover a debt due by him the board of his wards, and not for the purpose of receining any specific property of the wards in his hand. That he was described as guardian did not make it as against the wards to recover of them this debt, but it was a mere descriptio personæ of the defendant, and althous so named, the suit was to recover of him personally debt which he owed under an implied contract. The fit that the same might be a proper charge against the est of his wards did not change his liability. But if this we not so, and the executor was not a proper party of fendant to this suit, he should have made his defence the scire facias when he was called on to show cause we he should not be made a party.

A scire facias is in the nature of a suit, an action

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which the defendant may plead, and to which it is incumbent on him to plead before the judgment of the court is rendered. I Kelly, 292-3; 2 Ib., 89; 45 Ga., 91.

In this case the record shows that this executor acknowledged service of the *scire facias*, first by his attorneys and ratified it afterward under his own signature, and two months thereafter was made a party defendant by the judgment of the court. This being so, it was too late at the trial term of the case, twelve months later, to seek by demurrer to set the judgment on the *scire facias* aside to prevent the progress of this suit. 45 Ga., 89.

The second and third grounds of the motion for a new trial are disposed of by the ruling on the matter of the motion in arrest of the judgment.

3, 4. The remaining grounds of the motion involved 1st, the evidence justifying the verdict; 2d, whether the verdict is against the principles of equity and justice; and, 3d, whether the court did not commit error in charging the jury that if Digby, as guardian, received Confederate money, and there was no evidence before them that it was received by him at a time when men of prudence and good business judgment received it, that he should be held liable therefor as good money, when the same had been returned and allowed by the ordinary as Confederate money.

An examination of the testimony shows that the verdict might have been maintained for a larger sum; but how it could have been reduced we do not see, except by ignoring the evidence of at least two of the witnesses for the plaintiff. In so far as the charge of the court goes to affect the finding, it is only necessary to say that the returns of a guardian are only prima facie evidence for or against him, and have never been held conclusive. 45 Ga., 520; 59 Ib., 213.

Judgment affirmed.

Analey, trustee, et al. vs. Pace & Co. et al.

### ANSLEY, trustee, et al. vs. PACE & COMPANY et al.

- 1. Where a trustee filed his petition for leave to sell certain realty of the trust estate, alleging that certain debts (stating them in detail) were due, and there was no means of paying them except by selling this realty, and thereupon obtained a verdict and decree for such sale, in a subsequent proceeding to require him to sell, he was not competent as a witness to prove that the statements in his petition were untrue, and that the debts were not really those of the trust estate,
- 2. Where no authority is given by the deed creating a trust estate, or by the voluntary consent of all the beneficiaries, any part of the corpus may be sold by virtue of an order of the court of chancery upon regular application to the same, and this may be done at chambers in vacation. Nor does the fact that there is a remainder interest alter the power of the chancellor to order a sale.
- (a.) Where power to sell has been granted to a trustee, and he fails or refuses to exercise it, upon proper case made the chancellor may order him to sell.
- (b.) The birth of a child who might have an interest in a trust estate, after an order allowing a sale of the corpus, would not invalidate it. So far as its interest could be represented, the trustee was its representative.

Witness. Evidence. Trusts. Practice in Superior Court. Before Judge STEWART. Newton Superior Court. September Term, 1881.

The following, in connection with the decision, sufficiently reports this case:

The present bill was filed by creditors to enforce a sale by Ansley, trustee, of certain property under leave formerly obtained by the said trustee for the sale of the trust property, and appropriation of the proceeds to the satisfaction of debts of the trust estate. The beneficiaries under the deed creating the trust estate were S. A. Ansley, wife of the trustee, during her natural life, with remainder to her children living at her death. The deed provided that in case there were no children to take in remainder, the property should revert to the donor, the

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pted father of said S. A. Ansley. The case was subted to the judge, without a jury. He decided that trustee should sell the property and apply the prods to the payment of the creditors in accordance with previous decree; the defendant excepted.

EMMETT WOMACK, for plaintiff in error.

LARK & PACE, for defendants.

WFORD, Justice.

It the September term, 1876, of the superior court of wton county, D. H. Ansley, as trustee for his wife and dren, presented a petition to the court, alleging that trust estate was indebted to certain named creditors necessaries furnished for the support of the cestui que ets, and having no means except eight hundred and rteen acres of land wherewith to pay the same, prayed order for the sale of so much thereof as might be necry to pay the said debts. Other matters touching the trust estate were included in said petition, but nothmaterial to the questions in issue here. To this peti-Mrs. S. A. Ansley was a party, she being one of the ui que trusts, and expressed her consent to said sale in ing. A guardian ad litem was appointed for the or children, who accepted the trust, and with full wledge of all the facts, consented and agreed to the sale, and asked that the prayer of the trustee be ited. In addition to these parties, the heirs of the inal grantor in the deed, who in a remote contingency ht inherit this land in remainder, were also made parand assented and prayed that the sale might be aled.

o this petition, and as a part of the proceedings eof, was added a list of the creditors, with the amounts to each for the necessaries so furnished for the supof the said *cestui que trusts*, and for whose benefit the was to be made. Ansley, trustee, et al. vs. Pace & Co. et al.

At the adjourned term in December, 1876, the judge of the court, upon the reading of the petition, ordered a jury to come, to whom the facts were submitted, and who, upon hearing the same, returned a verdict finding that the debts set forth were due from the trust estate and that leave be granted to the said trustee to sell a sufficient portion of the land to pay off and discharge the debts; whereupon the chancellor ordered and decreed that the trustee do sell such portion of the land, not exceeding three hundred acres, as might be sufficient to pay the said debts.

The foregoing decree having been obtained in 1876 and the said trustee having failed to comply with the same, this bill was filed to enforce its execution. The defendants, by their answer, admitted all the facts charged in the bill, except that the debts set forth in the original bill or petition were contracted for the benefit of the trust estate; this they denied; and they further set up the fact that another child had been born to Mrs. S. A. Ansley since the rendition of the decree.

The parties submitted the cause to the chancellor both on the law and facts, who found for the complainants and decreed that the said trustee proceed to sell the land as directed by the decree of 1876, and that he pay over the proceeds to the creditors.

To this finding and decree the defendants excepted, making two assignments of error:

(1.) That the court rejected Ansley as a witness to prove that the debts set out in the petition filed by him for the order to sell this land were not the debts of the trust estate, but were his individual debts.

(2.) That the decree was unauthorized and illegal.

1. Upon the first ground of error our opinion is, that the ruling of the court was right in refusing to allow the testimony of Ansley to be introduced to contradict his solemn admissions in judicio, which were of record, and the foundation of the proceedings upon which he had

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ome into court, prayed for and obtained a judgment and ecree for the benefit of parties whose interest he then epresented, but to whose injury he now offered to testify. he record of that case, that is, the petition setting forth he fact that these debts were due from the trust estate hat they had been made for the support of the cestui que rusts, the verdict of the jury finding the same facts, and he decree of the chancellor founded upon the verdict, ad been put in evidence and were before the judge, when he petitioner, Ansley, was offered to swear away the ruthfulness of his petition, the verdict of the jury hereon, and the decree of the chancellor in pursuance hereof. Even if this testimony should not fall strictly nder the head of solemn admissions in judicio, yet it can ardly be supposed that had it been admitted the finding f the judge would have been affected by it, as against he record evidence submitted by the complainants, and specially when he regarded it so wholly illegal as to exlude it from his consideration.

The witness was properly rejected.
2. As to the second ground of error, it is urged that he original decree was void, even if it is admitted that he debts were due from the trust estate, because the hancellor had no power to order a sale of any part f the corpus of the estate, when there were remainermen. And that the birth of a child since that decree vas rendered, who was not in esse at that time, and who y possibility might become the sole heir of the remainder nterest, not being a party to that proceeding, can not ave its rights divested thereby. On these grounds it is laimed that the decree in this case is illegal. 327 of the Code, provision is made where no authority s given by the deed creating the trust estate, or by the oluntary consent of all the beneficiaries to sell any part of the corpus of the estate, that the same may be done by virtue of an order of the court of chancery upon reglar application to the same, and this may be done at

chambers in vacation. Indeed this power was exercisely our courts of chancery long before the passage of act of 1853-4 authorizing it. Not only so, but the power sale was exercised in cases where there were remaininterests, upon a proper showing made. This power sale must be lodged somewhere, when cases arise mak it absolutely necessary to preserve itself, or to preventhe want and suffering of the cestui que trusts, or simulated the beneficiaries must rest in the fidelity of the chancellors, who should seek to give effect in letter a spirit as far as possible to the purposes and objects soughly the creator of the trust. See Code, §2336, and fre §4221 to §4224, inclusive.

In so far as the rights of the after-born child are corned, the question was ruled in the case of *Dean*, exetor, vs. The Central Cotton Press Company, February ten 1880.

Judgment affirmed.

### LANGSTON vs. ROBY et al.

- 1. One judgment may be set off against another, on motion, whet in the hands of an original party or of an assignee. It does not me ter that one may be founded on an action ex delicto and the ot an action ex contractu, nor that one may be junior to the oth Code, §3467.
- 2. While parties cannot settle a judgment so as to avoid the lier the plaintiff's attorney for his fee, yet the right of setting off of judgment against another is conferred by express statute, and no be exercised although the practical result may be an extinguishm of such judgment in whole or in part, and thereby the attorn may lose the power of enforcing it for his fee.

Judgments. Attorney and Client. Set-Off. Before Judge LAWSON. Jasper Superior Court. October Ten. 1881.

At the April term, 1878, of Jasper superior court, lenry Roby recovered a judgment on an action of tresass for damages against David M. Langston, which suit as instituted by C. W. Jordan, Esq., as attorney, for the am of \$50.00, principal. On the 2d day of July, 1878, David M. Langston recovered a judgment on an account use previous to April, 1878, in the county court of Jasper county, against Henry Roby, for the sum of \$48.25 principal.

At the October term, 1878, Langston moved the court hat the said judgment of Roby vs. Langston and that f Langston vs. Roby be set off the one against the other, lleging the insolvency of Roby. On motion, C. W. Joran, the attorney of record of Roby, was made a party. Messrs. Key & Preston, who alleged that they were attoreys, employed by said Roby to assist said Jordan to rosecute the suit, were also made parties, and the motion roceeded to trial.

The following evidence was introduced: A judgment of favor of D. M. Langston vs. Henry Roby, dated July d, 1878, for \$48.25 principal; interest from October 1st, 876; costs, \$3.00.

The judgment of Roby vs. Langston, for \$50.00 princial; interest from April 22d, 1878, and costs; rendered april 23d, 1878.

Proof of Roby's insolvency was made by Langston.

C. W. Jordan testified: He and Key & Preston were the ttorneys who reduced to judgment the claim of Roby vs. angston. The suit was originally for \$200.00. Witness led the writ, and before suit commenced agreed with toby to take half the recovery as his fee. The case was ried twice in the county court and appealed, when the verict and judgment for \$50.00 were rendered. Roby then aid that witness and Key & Preston could take the recovery as their fee, and that the entire judgment was not nough to pay them. Witness claims one-half the recovery or his fee.

John C. Key testified: Key & Preston were original coun-

sel, with C. W. Jordan, in suit of Roby vs. Langston. Their agreed fee was \$20.00 for obtaining the judgment, and they claim as their property that amount of the judgment. After the judgment was obtained, plaintiff, Roby, stated to witness that the judgment was not more than enough to pay his lawyers, and that they might take the whole of it. Key & Preston now claim \$20.00 of the judgment as their fee.

On the trial of said motion, the jury, under the charge of the court, returned a verdict crediting as a set-off on Roby's fi. fa., \$5.00. Langston moved for a new trial. Among the grounds of the motion were the following:

- (1.) Because the verdict is contrary to law and evidence and without sufficient evidence to support it.
- (2.) Because the court erred in holding and ruling that Langston was not entitled to have the judgment in his favor vs. Roby, set off against that of Roby, except as to the residue, if any after paying to C. W. Jordan the sum of \$25.00, and to Key & Preston the sum of \$20.00, out of the amount due upon the fi. fa. and judgment of Roby vs. Langston.

The motion was overruled, and Langston excepted.

G. T. & C. L. BARTLETT; B. WHITFIELD, for plaintiff in error.

KEY & PRESTON; C. W. JORDAN; JACKSON & KING, for the defendant.

JACKSON, Chief Justice.

The question made in this case is, can a judgment junior by three months to another be set off against the other so as to extinguish counsel fees, or a lien for counsel fees upon the senior judgment, the senior judgment being rendered in a suit for tort, and the junior judgment on a cause of action arising ex contractu?

The judgment ex contractu could be set off to that ex

to between the parties themselves, beyond all doubt; use the statute does not make the character of the ment a condition to the right of set-off. The statute one judgment may be set off against another, on mowhether in the hands of an original party or of an ase." So, if the two judgments be for money, it makes ifference what may have been the character of the of action on which either was rendered. Nor ben those parties would it matter which was senior or or; for the statute is broad, and without reference to allows the one, on mere motion, to be set off against ther. Even if transferred, and the original parties be onger at issue, but an assignee be pressing either, still, notion, the set-off will be allowed; for the statute is icit that it may be done, "whether in the hands of an nal party or an assignee."

therefore, in this case, the counsel claimed that there d be no set off because they were assignees of the ment against which the other was to be set off, the ate would meet them in its explicit declaration that assignment made no difference. As assignees they d on no higher ground than if they had been the orill plaintiffs, and it had been moved to set off a judget against themselves.

that they invoke their lien for fees upon the judgment the they obtained as counsel, and say that this lien atted to the judgment under section 1989 of the Code, therefore, the junior judgment could not be set off them.

the statute of February, 1873, codified in that secupon a moneyed judgment or decree, the lien is on judgment or decree; upon a judgment or decree for terty, it is on the property recovered. We deal in this with judgments for money; and the statute enacts in tect to them that "they (the attorneys) shall have a superior to all liens but tax liens, and no person shall t liberty to satisfy said suit, judgment or decree, until lien or claim of the attorney for his fees is fully satis-

fied; and attorneys at law shall have the same right a power over said suits, judgments and decrees, to enfo their liens, as their clients had or may have for amount due thereon to them."

This is a lien on the judgment. Whatever the ju ment is worth to that it attaches. Whatever the ju ment covers, that the accompanying lien covers also. extends to nothing over which the lien of the judgm does not extend, and the lien of the judgment does extend over a judgment which the defendant to the judgment holds against the plaintiff thereto. The judgments are of equal dignity. The one extinguis the other to the extent that its nominal value goes. that extent it satisfies it by operation of law, and a tion in court applies that extinguishment or satisfaction No person can do it as against the lien of these fe but the law can, and the court, on motion, can and d by applying the law to the case. The defendant can satisfy it, by compromising or paying it or buying it; if he has a legal defence to it, other than his act of p ing, or compromising, or purchasing it, he may set such defences. The attorneys "have the same right: power" over the judgment, "to enforce their liens their clients had or may have," no more no less. In hands of their clients the judgment was subject to defence of the set-off of another judgment, older younger, founded on contract or tort. In the hand the attorneys it is subject to the same defences. defendant in execution may not satisfy it so as to del this lien by any arrangement with the plaintiff, but may bona fide defend against the attorneys just as fu as against their clients, the original plaintiffs.

Suppose the judgment proposed to be set off were senior, how unjust would it be to make the owner of t judgment pay one junior to it, when he held his own a larger amount, and could not make a cent out of it cept by setting it off against an insolvent, as is the chere—the other party being insolvent! It would be

the him pay his adversary's lawyers. What difference is it make if his judgment be junior? The statute it is none. If the junior judgment in such a case had no obtained by collusion with the other party to carry a settlement in order to defeat the lien of the attors, then, indeed, there might be a difference, and neithaw nor equity would tolerate the fraudulent collusion defeat the lien. If the fraud be perpetrated by a judgment, it makes no difference; for fraud vitiates all tracts, and creditors or bona fide purchasers may attack addigment for fraud or collusion wherever it interferes in their rights, either at law or in equity. Code, §§3596, I.

But there is no pretence here of any collusion between se parties to defeat the attorneys. On the contrary, it ks more like an effort to enable the attorneys of an invent client to make their fees out of his solvent advery; and the client, so far as appears in the record, is quite ling that it be done.

ustice, therefore, accords with our view of strict law, if the judgment must be reversed on the ground that court erred in not allowing the set-off of the one judgment against the other.

udgment reversed.

Cited for plaintiff in error: Code, §§3467, 3597; 49 Ga., 4 · 6 Ib., 515; 2 Ib., 155; 1 A. K. March., 510; 3 Paige, 5; 1 Binney, 429; 32 Ga., 302; 27 Ib., 432; 48 Ib., 431; b., 361; 9 Ib., 397.
For defendant: Code, §§2902, 3467; 41 Ga., 260; Code,

For defendant: Code, §§2902, 3467; 41 Ga., 260; Code, 989; 36 Ga., 629; 39 Ib., 310; 50 Ib., 599; 41 Ib., 320, 1; 45 Ib., 169; 48 Ib., 431; 51 Ib., 94; 46 Ib., 424, 434. v 68-28

# THE SUMMERVILLE MACADAMIZED GRADED OR PLAN ROAD COMPANY vs. BAKER.

I. Where a plank road company, which had the exclusive right to strip of land over which its road ran, subsequently became a tena in common with an individual in a lot of which the strip had for merly been a part, and, upon an agreed division of the lot held common, a deed from the individual to the company provided a dividing line to run from the road to another specified point, su line would begin at the edge of the road, not at its center.

(a.) It was immaterial whether the right of possession by the corpration was absolute and for all purposes, or for road purposes on on the deed above stated, the maker could not eject the corporati

from land never held in common.

 It being desirable to stop further litigation, a new trial is order unless the plaintiff will disclaim any right to the road-bed of t company; in that case the judgment will be affirmed.

Ejectment. Title. Deeds. Charge of Court. Ne Trial. Easements. Tenants in Common. Before Judg SNEAD. Richmond Superior Court. October Term, 188

On the 28th of September, 1880, Baker sued the Plan Road Co. for a lot of land, with mesne profits from Marc 1880, containing an acre, more or less, bounded north l the plank road, and a lot of land owned by the Augus & Summerville Railroad Company, having a front of said road and lot of 190 feet, more or less; bounded of the east by Baker's land; south by land of Hickma known as Perkins' lot, and running along it 100 feet mo or less; and west by land of plank road, whereon a ne toll-gate and house have been placed by said compan and to which Baker claimed title. The abstract of tit set out a deed of partition between Baker and the Plan Road Company, dated July 18th, 1862, recorded April 20 1880, which conveys to plaintiff, "all that part of the sai Guidron lot lying south of the Summerville plank road and east of the basin formed at the mouth of the larg gully thereon; the dividing line to be run south from

said road to the Perkins' lot, and fenced by the said Alfred Baker."

Defendant pleaded not guilty, the statute of limitations, and an equitable plea of estoppel by Baker's act in putting up a line fence in 1862, which has been so considered ever since by the Plank Road Company.

The testimony showed the following facts:

The state granted to George Walton 250 acres of land April 7th, 1783. This was laid out into the village of Summerville by Lemuel Wales shortly thereafter. Lots one and two on this plat each contained eleven acres. Number one was owned by the estate of Martin, and number two is the "Guidron" lot, which on May 12th, 1851, was conveyed to George W. Williams and Alexander Martin, jointly. April, 1852, Williams conveyed his one-half to Pemberton. The plank road was incorporated by Richmond inferior court in perpetuity, April 4th, 1853, under act of February 23d, 1850. This road was built from Augusta to the United States Arsenal in Summerville.

As the plank road ascends the Sand Hill, on which the village is situated, it crosses diagonally lots one and two. On the 19th of February, 1862, Pemberton sold his half interest to Alfred Baker. On the 16th of July, 1862, four deeds were executed, viz: From Alexander Martin, executor of Angus Martin, to the defendant for a right of way over that part of the land belonging to the estate of said deceased heretofore taken by said company, and now forming a portion of their road-bed.

A deed from Alexander Martin to the defendant in consideration of certain things done by defendant pursuant to an agreement made in 1855, conveying all his right in the Guidron lot, being an undivided moiety with Alfred Baker.

A deed recorded May 22d, 1863, from Baker to the Plank Road Company, reciting the joint ownership in the Guidron lot, and a partition of the same by agreement; conveys Baker's half interest to the defendant in that

part of the said Guidron lot which is bounded north by a lot owned by the estate of Angus Martin, deceased, south by a lot held in trust for Mrs. Jabez C. Perkins, east by a line fence to be run south from the Summerville plank road to the said Perkins lot at a point opposite the basin, formed at the mouth of the large gully thereon, and west by Telfair street.

There was conflicting evidence as to where the line ran which divided the two portions of the lot—whether along the line of an old fence or along a line marked out by a surveyor.

The jury found for the plaintiff. Defendant moved for a new trial, one ground of alleged error being as follows:

(I.) Because the court charged as follows:

"Now, gentlemen, this is a very simple question for you to determine. It is simply a question of title as to the acre of land called the Guidron lot, and I am asked to construe a part of this deed. It is in these words: (Deed from Plank Road Company to Alfred Baker, on which he relies for recovery,) 'That lot lying south of the Summerville plank road and east of the basin formed at the mouth of the large gully thereon, the dividing line to run south from said road to said Perkins' lot, and fenced by said Alfred Baker.'

"I charge you that this expression here 'to run south from said road' means that where land is bounded by a road, the title goes to the centre of the road; so where this line was to run south from the road, it was south from the centre of the road—south from the center of the road and east to the basin formed at the mouth of the large gully thereon," etc.

The motion was overruled, and defendant excepted.

FRANK H. MILLER, for plaintiff in error.

JAS. S. & E. B. HOOK; FOSTER & LAMAR, for defendant.

## JACKSON, Chief Justice.

In this record one clear error of law appears. The case is an action of ejectment brought to recover a parcel of land in the possession of defendant. Plaintiff and defendant were tenants in common of the same parcel of land, and it was partitioned between them many years ago, the parties conveying to each other the several halves thereof. A short time ago the defendant entered on an unenclosed strip within the line claimed by it, but also within the line claimed by the plaintiff; so that the issue was, what is the true line agreed upon when the lot was divided? The jury found for the plaintiff, and defendant being denied a new trial excepted, and assigns error on all the grounds of the motion. One of these grounds is that the court erred in charging the jury that the plaintiff's line between the two halves of the lot began at the center of defendant's way acquired for its road-track, and not from the southern edge of that way, and that the verdict establishes the line from the center and not from the southern extremity or edge of the way of fifty feet width.

The action of ejectment is brought to recover the possession of the land. The effect of the ruling and of the verdict therefore is to put the plaintiff in possession of land, up to the center of defendant's strip of fifty feet. Defendant was in peaceable possession of this, its roadbed, many years before it became a tenant in common with plaintiff of the tract which was partitioned between them, and the dividing line of which tract was in dispute. This lot was bought by the parties, while the defendant alone owned its road-bed of fifty feet. No part of this fifty feet ever was partitioned between them, because no part of it was ever owned by them in common, so as to subject it to the remedy and writ of partition or to the agreement to partition it. But the effect of the charge and of the verdict is to throw into the part belonging to

the plaintiff some of the road-bed which never belonged to the two parties in common, and therefore never could have been divided.

Such ruling is error; and the verdict, in so far as it extends plaintiff's right in any line surveyed over the southern edge of defendant's road-bed of fifty feet, and encroaches thereon one inch, is contrary to law, and must be set aside.

It is immaterial whether the fee be in the company to this road-bed—the absolute property forever and for all purposes—or not. If it be but the right to enjoy the possession and the exclusive possession of this road-bed, no other person can dispossess the company as long as its possession continues for the use of the road-bed in accordance with its charter and title; and no action of ejectment can turn it out and put another in any part of that road-bed. The case is too plain for argument, too clear for question. It became so much so in the argument before this court that counsel for plaintiff disclaimed that such was the claim of their client or the effect of the verdict.

2. Inasmuch, however, as both parties seem agreed that further controversy would cease if the line found by the jury be established as the true dividing line as to the direction in which it ran, to divide the track but not to encroach on the road-bed, and as it is desirable in view of public policy, perhaps in saving the expense of another long trial as well as in terminating litigation as soon as possible, we forbear to go further in the case than to decide this point. We reverse the judgment on this ground, and direct that a new trial be granted, unless the plaintiff shall disclaim all right under the verdict to encroach on the road-bed of fifty feet, but agree to start the dividing line from the southern edge of the road-bed and run thence south to the other terminus at the mouth of the gully.

Judgment reversed on terms.

### WOOD et al. vs. ISOM et al.

- One party to a suit may invoke allegations made in the pleadings of the other to his benefit, and dispense with other proof thereof than the averment of his adversary.
- If one who holds land has some mental weakness, and another claims the land, and fraudulently uses that weakness as a means of coercing the will of the owner so as to induce him to make a deed to a portion thereof, such grantor may have his conveyance set aside.
- 3. If one bona fide claims land held by another, though the title of the claimant may be imperfect, he may make a valid compromise with the holder and receive a deed to a portion of the land, even though the holder had no other motive for making the conveyance than the belief that under the Scriptures a man ought to give up his property rather than go to law. It is not inequitable to invoke the belief of one's adversary in biblical teachings in order to effect a settlement, provided no deceitful means, or artful practices, or fraudulent representations, or concealments, be used.
- 4. While it is the duty of an agent to keep his principal informed concerning the business involved in his agency, there is no duty requiring the principal to communicate his business to his agent, unless he desires to do so.
- 5. Though generally one party to a transaction cannot testify to matters which occurred between him and the other party since deceased, yet he is competent to rebut testimony concerning transactions or conversations testified to by living witnesses introduced by the opposing party.
- (a.) The certificate of the presiding judge as to the grounds of a motion for new trial is conclusive. Although a stenographer may have taken down the testimony, and the brief of evidence may have been approved by the judge, yet statements therein of objections made by counsel and rulings of the court will not overcome or vary the certificate of the judge to the grounds of the motion for new trial.
- 6. The case was fairly submitted by the charge of the court.
- (a.) When the ends of justice require it, the presiding judge may recall the jury and re-charge them; nor will it work a new trial if he reads to them their oath as jurors.
- 7. The verdict is sustained by the evidence.

Pleadings. Evidence. Equity. Fraud. Title. Principal and Agent. Contracts. Witness. Practice in Su-

perior Court. Jury. Before Judge HILLYER. Fulton Superior Court. April Term, 1881.

Joseph Wood et al., as heirs of Elias Wood, deceased, filed their bill vs. John Isom, Hulsey & Tigner, Jno. R. Wallace, Benj. Williams, A. J. Atkinson and S. L. Mosely. The bill, as amended, alleged that Elias Wood, during the year 1847, became possessed of a tract of land, lot number 250, in the 17th district of Fulton county, containing 202 1-2 acres. That he bought said land from D. I. Connelly, paying a full price therefor and taking a fee simple warranty deed thereto. That he went into possession at once and continued in peaceable possession until April, 1870. That about April, 1870, when said Elias, being about sixty years of age, had become greatly enfeebled and diseased, so as to be totally unfitted for business, and especially to transact business with shrewd, sharp men anxious to deceive him, and when he had become thoroughly superstitious, giving his entire mind to religion, and surrendering all interest in earthly matters, (he having always been unable to either read or write, and utterly averse to any form of litigation), he was approached by John Isom and W. A. Tigner. Complainants aver that previous to this time said Isom had purchased, or pretended to have purchased, a claim of some nature to the property above mentioned, though complainants are unable to state what it may be, but they do say that it is worthless. That said Isom, knowing the invalidity of his claim, but wishing to defraud and cheat said Elias, came to Atlanta and employed as his assistants Hulsey & Tigner, attorneys at law. That said Tigner was also a minister of the gospel, and because of the peculiar disposition of the mind of said Elias, well fitted for his part in the fraud about to be perpetrated. That by means of threatened suits, or bills, of so called religious warnings, of repeated visits, remonstrances and entreaties, the above named confederates so wrought on the weak and darkened mind of

said Elias that they induced or forced him to convey to said Isom all of said tract, except fifty acres in the southeast corner thereof. That said conveyance was wholly without consideration, and was the result of gross imposition and deceptions practiced on said Elias by said Isom, Hulsey & Tigner, and of the fanatical state of said Elias' mind. That afterwards the land so obtained was divided between Isom. Hulsev & Tigner. Isom taking 52 2-3 acres, and Hulsey & Tigner 100 That Isom, in January, 1872, conveyed his part to John R. Wallace. That Wallace conveyed to S. L. Mosely in 1875, and Mosely conveyed to Atkinson, who now holds the land under bond for title from Mosely. That Hulsey & Tigner conveyed their share to Benj. Williams, on December 10th, 1873, who is now in possession of the same. That all of said parties had notice of the fraud and wrong done, etc. That said Elias lingered in great pain of body and mind until the year ----, when he died, leaving complainants as his sole heirs, and leaving no will. That on March 10th, 1874, complainants brought actions of ejectment vs. said Williams and one Crawford Munroe for said lands in Fulton superior court, and that said suits are still pending. The bill further charges the various defendants with rents and profits of the land from the time it came into their possession to the termination of this cause.

The prayers are: That the conveyance from Elias Wood to Isom be decreed to be null and be set aside, and that it be brought into court and cancelled. That all the other conveyances mentioned be set aside, and title be decreed to be in complainants. That defendants be compelled to account for rents and profits. That in the event there can be no recovery from Benj. Williams a money decree be had against Hulsey & Tigner. That deed from Wood to Isom be produced and delivered up. That ejectment suits be stayed and general relief be given.

Exhibited to the bill was a deed from Elias Wood to

John Isom, dated April 23d, 1870; consideration expressed as being \$800.00, conveying land in dispute

The following answers were filed:

W. A. Tigner answered, in brief, as follows: Denies that he was a minister at the time of the conveyance to Isom. Says he never saw Elias Wood before the day he and his sons came to respondent's office to settle litigation about land in controversy. Prior to that time John Isom had placed his claim in the hands of Hulsey & Tigner for suit, and suit had been commenced by them vs. Wood. Isom told Hulsey & Tigner that he had made a proposition of settlement to Wood, and instructed them to accept it if Wood desired to accede to it, and to settle with Wood. Denies that he gave Wood any religious warnings or remonstrances to induce the trade. The old man and all his boys but one came to the office and announced that he had come to accept Isom's proposition. Hulsey & Tigner had no agency in bringing him there; he came with his sons, and if he was under any spell or religious influence, or any undue influence from any source, his sons ought to have known it and communicated it to Hulsey & Tigner: but nothing was said about it to them, and they, present and taking part in the transaction, seemed to think and acted as if they thought the old gentleman was doing right. Hulsey & Tigner did not make the offer of compromise; they simply acted as directed by Isom to accept for him the trade proposed by him; they had nothing to do, and gave no advice about the matter. It is respondent's recollection that old man Wood stated there before the trade was made, that Connelly did not have title to the land, but that he had repaid what he paid to Connelly, by the use of it. After the trade, the old man rented the place from Isom and held it as his tenant the balance of the year. Hulsey & Tigner further agreed with the old man and the boys to try to get Isom to sell the land to the old man, which they did try to do. The old man and the

boys left the office perfectly satisfied, so far as we knew or could judge, and there was not the slightest evidence of dissatisfaction on their part. Hulsey & Tigner took only one third as a fee, and bought one third from Isom afterwards. Denies all notice and all charge of fraud. Respondent did not hear of any dissatisfaction about the matter until long after the trade, when he learned that some of the boys said they were going to sue for the land as soon as the old man died. This was long after Hulsey & Tigner had bought of Isom. Hulsey & Tigner sold their part of the land to Williams and had to take \$500.00 less than it was worth on account of the talk of the Wood boys at and about that time about suing for the land. Bill charges too much for rent, etc.

Jno. R. Wallace answered in brief as follows: Knows nothing as to how Elias Wood went into possession of the land. Denies that said Elias was greatly enfeebled and incapacitated for business, giving his entire mind to religion, but on the contrary respondent says said Wood was capable of managing his property with care, skill and ability up to the time of his death. Respondent bought fifty acres of land in dispute from Isom, and paid ——dollars for it. Respondent bought in good faith, and denies all notice. Believed Isom had a perfect title, and he never heard even a rumor to the contrary till long after the purchase and payment for the same.

Benj. Williams answered, in brief, as follows: Denies that Wood was imbecile. Admits purchase from Hulsey & Tigner. Denies any and all notice of any fraud, etc. When respondent bought Elias Wood was in life. Said Wood knew respondent was negotiating for the land, and he never gave respondent notice that title was not good in said Hulsey & Tigner.

W. H. Hulsey's answer was substantially the same as that of W. A. Tigner.

S. L. Mosely's answer admits his purchase of fifty acres from Wallace in 1875. Denies any notice.

Evidence was introduced in support of the pleadings and answers, which it is unnecessary to set out here. The jury found for the defendants. Complainants moved for a new trial on the following among other grounds:

- (1.) Because said verdict is contrary to equity and good conscience.
- (2.) Because the court charged the jury as follows: "Either party has the right to invoke in his favor or for his benefit any allegations that may be in the pleadings of the other party, as for instance, the bill charges that, as a part of the series of transactions in question, a certain quantity of the land in dispute was conveyed to Messrs. Hulsey & Tigner. In the opinion of the court that dispenses with the necessity of the defendants, introducing the deed showing title in them. But this circumstance does not add any force to other averments in this bill, they still have to be proved."
- (3.) Because the court charged the jury as follows: "If Mr. Wood was a person who had some particular weakness of mind, if there was a weak spot in his character with reference to the transaction or line of transactions in question, and if the other party, Isom or his assistants, knew that, and if they fraudulently took advantage of it and used that as a means to coerce his will and induce him to do that which he otherwise would not have done, then he himself, at any time before he died, could have reversed the transaction."
- (4.) Because the court charged the jury as follows: "If Mr. Isom believed that he had a true title, and was suing and pressing that title in good faith, he honestly believing, and was clean in his heart and purpose, and really believed that he had a right to recover, he would have a right to accept a deed and compromise in the dispute with Mr. Wood, even though Mr. Wood had no other motive for making the conveyance than the belief that under the Scriptures a man ought to give up his property rather than to go to law."

- (5.) Because the court charged the jury as follows: "The cart is of the opinion that the circumstance which you ill find in the record before you of the court down the cantry, that the final decree was not made in term time, a mere circumstance that the final decree had not been ade in term time would not by itself be sufficient to low bad faith on the part of Isom." [Isom claimed by true of a partition of certain lands as the estate of one anks.]
- (6.) Because the court charged as follows: "If he (Isom) uld not recover under Shank's title, and knew that he uld not, but merely used that as a means of attack on r. Wood to get his land away from him, and if Mr. ood was afflicted with weakness of mind so as to renrhim a prey to a scheme of that sort, and if Isom udulently took advantage of him, and in that manner occured the deed from him, then the deed is not binding Wood, and he could have set it aside." [The Shank's le was that set up by Isom, and by virtue of his claim is compromise was affected.]
- (7.) Because the court charged as follows: "It is the ty of the agent to communicate and keep his princilinformed, but the principal is under no obligation to mmunicate to the agent; and in this case Mr. Isomould be under no obligation to tell Hulsey & Tigner y thing further about his business than he chose to do."
- (14.) Because the court erred in allowing W. H. Hulsey d W. A. Tigner to testify, over the objection of comminants' counsel, that Elias Wood said in their office at the time the deed was made from him to Isom, that he d always intended to give up the land when the true oner came for it, etc. [In approving this ground of the otion the court added a note which is set out in the 5th vision of the decision.]
- (15.) Because the court, after the case had been argued d the jury had retired, and after the jury had been conlering the case in their jury room for many hours, re-

called the jury and read over to them their oath, saying to them that sometimes lawyers in administering to them the oath did so indistinctly. This was done in the presence of counsel, but without consulting the attorneys on either side, and without announcing to them the intention of the court to recall the jury.

The motion was overruled, and complainants excepted.

COLLIER & COLLIER; H. C. PEEPLES, for plaintiffs in error.

McCAY & ABBOTT, for defendants.

JACKSON, Chief Justice.

This bill was brought by the heirs at law of Wood against Isom and others. The object of the bill is to set aside certain deeds, some as fraudulent, and others as taken with notice of the fraud of the original grantee, or in the event there was no notice to affect the purchasers, then to make the grantors to them account for the value of the lands so held from them by innocent purchasers without notice. The gravamen of the bill rests on the allegation that Isom took undue advantage of alleged weakness of mind in Wood, springing from deep religious convictions of duty, and that Hulsey & Tigner, the counsel of Isom, confederated with him to defraud Wood by taking advantage of the same alleged imbecility. The answers denied every thing of the sort, and the main issue was fraud or no fraud in the original contract for the land between Wood and Isom and his counsel. Various other points arose out of issues affecting subsequent purchasers as to the bona fides of their several purchases, and how far they had notice, and how far what they knew affected each of them. The jury found a general verdict for defendants, the effect of which is to find no fraud in the original purchase, and to that question and rulings in respect to that issue we first address ourselves.

1, 2, 3, 4. Many grounds of error are laid in the motion or a new trial, all of which are found in the report of the ase, but so far as they affect the main issue and relate to he charge of the court on that issue, they are the 2d, 3d, th, 5th, 6th and 7th.

In respect to them all we are unable to see error in hem, and the charge as a whole on the points made in he grounds above mentioned, meets our approval. d simply recognizes the right of one party to invoke an llegation of the other in the pleadings to his benefit, and ispense with other proof thereof than the averment of is adversary. The 3d lays down a correct rule of law on which Wood in his lifetime could have set aside the coneyance had he sued, in this, that if Isom or his counsel or ssistants took advantage of the weakness of Wood and raudulently used it to coerce his will, and cause him do hat he would not have done otherwise, then Wood could ave set the deed aside. The 4th and 5th relate to Isom's tle to the land, and are to the effect that though that title ay have been imperfect, yet if Isom believed it good, he ad a right to compromise his claim with Wood and get the onveyance to part of the land in dispute, "even though Yood had no other motive for making the conveyance nan the belief that under the Scriptures a man ought to ive up his property rather than go to law." Surely it is ot inequitable in a man holding an honest claim to proerty even to ask his adversary, rather than go to law, to ettle in accordance with the word of God, and to invoke his aid the faith and piety of his adversary to bring pout the settlement, provided he use no deceitful means nd artful practices, or false and fraudulent representations r concealments. And the court fully guards the above roviso in the charge excepted to in the 6th ground, which undoubtedly law, and good law, and as fair and favorable complainants as equity will go. The 7th simply lays own the rule, that while it is the duty of the agent to ommunicate to and keep the principal informed, the

principal is not bound to tell his agent every thing about his business, and applies the rule to this case by saying that Isom was under no obligation to tell Hulsey & Tigner anything further about his business than he chose to do.

5. The 14th ground relates to the competency of Hulsey & Tigner to testify, as Wood was dead. Their competency turns on the particular facts to which they were called and the circumstances under which their testimony was elicited. As set out in the ground, the objection is not clear. It is thus stated there: "To testify over the objection of complainants' counsel that Elias Wood said in their office, at the time the deed was made from him to Isom, that he had always intended to give up the land when the true owner came for it," etc. It must be considered in connection with the circumstances under which the testimony was admitted.

The presiding judge thus details them: "The court certifies that the witnesses, Hulsey and Tigner, were allowed, after objection made, to testify to nothing transpiring between them and the deceased, save in rebuttal of the testimony of living witnesses, who had testified for complainants to the same, or to parts of the conversations or dealings. This was the distinct ruling of the court, elaborately explained, the court referring to the physician's case, Georgia Reports, and the Springfield case; and if any thing further was testified by these witnesses, or allowed to stand as their evidence, it was because counsel did not point it out or object to it."

With this explanation of the presiding judge, made in regard to the correctness of the grounds of the motion, and, therefore, controlling, there is clearly no error on this ground.

What the judge says and certifies, this court must regard as the truth of the case. Otherwise we should be at sea in all cases where recollection of what transpired varies; nor can we look at the notes of a stenographer to

vary the statement of the judge, even if they did so. The brief of the testimony alone, as taken down by the stenographer, is what governs; and even that must be certified by the judge; but the current of what takes place in the way of objections to testimony or motions to rule it out, is no part of the testimony itself, and must be looked for alone in the certificate of the judge.

6, 7. On this first and main issue, the case, we think, was fairly and fully submitted in the judge's charge. the right to recall and recharge the jury, if he thought the ends of justice demanded it, and to repeat in their hearing the oath they had taken in respect to the trial of the cause. The jury have passed on all the facts and rendered their verdict, and after a careful examination of this voluminous record, we see no error of law on that issue, and nothing to induce the belief that other than an honest verdict was rendered. It is rather matter of regret than of complaint that there are not more men of the simple faith of the ancestor of complainants, who preferred to yield something of right rather than violate what he believed to be the word of God, and who settled quickly with his adversary whilst in the way with him, rather than go to law with his brother, especially as in good conscience he doubted the complete justice of his own title. He has gone to an inheritance compared with which earthly lands are nothingness and vanity, and has left his children a legacy richer than money—the legacy of the good name of an humble, single-eved, undoubting servant and follower of Christ.

It is unnecessary to consider the issues in regard to subsequent purchasers.

Judgment affirmed.

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lvey et al. vs. Hammock.

## IVEY et al. vs. HAMMOCK.

- The judgment of the justice in awarding possession of the property in controversy in this case was not without foundation in evidence.
- 2. While generally partners are mutually entitled to possession of firm property, yet where by the terms of the partnership one partner is entitled to the exclusive possession and control of certain personalty in order to carry out the objects of the firm, the other cannot interfere with such possession, and for a violent or fraudulent taking of such property possessory warrant will lie.
- (a.) A tenant may recover personalty violently or fraudulently taken from his lawful possession by his landlord, though the title may be in the latter.

Possessory Warrants. Partnership. Before Judge WIL-LIS. Marion Superior Court. October Term, 1881.

Hammock sued out a possessory warrant before a justice of the peace, against E. J. & J. J. Ivey, for the recoverv of a steam saw-mill, which had been in the legal and peaceable possession of the plaintiff. On the trial before the justice, plaintiff testified substantially as follows: He had been recently in the quiet and peaceable possession of a certain steam saw-mill and fixtures belonging to said saw-mill; he was in possession of said property under a rent contract from defendants, for the year 1881, and by the terms of the contract he was to bear all the expenses, and to pay defendants one-fourth of the proceeds; they had agreed to put certain repairs upon the mill, but had failed to keep their contract; he, therefore, had refused to pay the rent. On the morning of the day on which the mill was moved, defendants came to him and told him that if he did not give up the mill they would have an officer there to take it, at the same time acting as though they awaited the arrival of the officer; he went to Cusseta to consult a lawyer, and while he was gone defendants moved the mill from Chattahoochee county into Marion county.

lvey et al. w. Hammock.

The defendants testified, in brief, as follows: They never nted the property to plaintiff, but simply employed him run and superintend the mill; they allowed him threeurths of the proceeds, because it took one half to pay the penses, and by the terms of the contract they were to rnish the mill and fixtures and plaintiff was to keep the me in good order, pay the hands and feed the stock; ey did not consider that under their contract they had arted with the possession of the property, and did not intend; the mill was a portable one, and either plainff or themselves could contract to saw lumber; they did ot look to plaintiff for their rent, but directly to the pares for whom they sawed; plaintiff had applied to them ratify a contract he had made to saw lumber for one ook, and they had refused to do so, or to allow plaintiff remove the mill to Cook's place; they had complied ith their contract.

The court awarded the possession of the property to laintiff. The defendants carried the cause to the superound court by certiorari, assigning the following grounds ferror:

- (1.) Because the contract shows that all of the parties ere entitled to the joint possession of the property.
- (2) Because the legal construction of the contract nade the parties partners.
- (3.) Because the judgment is contrary to the evidence nd the weight of the evidence.

The superior court affirmed the decision of the court elow, and the defendants excepted.

BLANDFORD & GARRARD; W. B. BUTT, for plaintiffs a error.

E. M. BUTT; E. W. MILLER, for defendant.

ACKSON, Chief Justice.

This case arises on a possessory warrant brought by the efendant in error against the plaintiffs in error to recover

Ivey et al. vs. Hammock.

possession of a steam saw-mill, which the latter took from the former fraudulently and without lawful warrant and authority. The justice of the peace remanded the mill to the possession of the defendant in error, and on certiorari the superior court affirmed the judgment, and the plaintiffs in error excepted.

1. The mill was in the peaceable and legally acquired possession of the defendant in error, when in his absence to procure counsel, on the false representation to him that an officer of the law would soon be present to dispossess him, and on looking up the road for the officer every moment, he was induced to leave, and the plaintiffs in error took it out of his possession, and out of the county of Chattahoochee into the county of Marion, in his absence produced by these fraudulent representations and acts by plaintiffs in error.

This is his side of the case, and it is found by the magistrate and the court below to be the truth. There being evidence enough to support it, this court does not interfere unless the law be violated in some material point. 56 Ga., 525.

The issue is not the right of property or of possession, but in whose lawfully acquired, quiet and peaceable possession it last was. Code, §4035; 22 Ga., 319; 30 lb., 209; 63 lb., 745. There seems to be no doubt that the property was last in the quiet and lawful possession of the defendant in error.

2. But it is insisted in argument here that both sides are or were in possession, as the facts make a partnership, and in such a case this writ will not lie. The reply is, first, that according to the case made by the defendant in error, he rented the mill, etc., and he was a tenant and not a partner; and, secondly, that if a partner, on the terms of the partnership, he must have the possession, and the exclusive possession, in order to carry out the partnership contract, as set up by the evidence of the plaintiffs in error themselves. For he had the entire management, the duty to

epair, to run the mill, to do all the work, and when they book it away from him the effect was to put it out of his ower to contribute his share to the partnership common ock—his work, skill, labor and supervision being set off gainst the material, mill, etc., furnished by the other side, herefore, though it may be that ordinarily one partner annot dispossess another, under the facts here, he may; the very terms of the contract of partnership necessarily evolve possession upon him, and fix it in him. If he has it is in the possession of the property from him by orce or fraud, but by recourse to regular suit, as precribed by law.

There was no error, therefore, in remanding the propery to the possession of defendant in error on his giving ond as fixed by law, and this was required by the order f the magistrate, and the affirmance of the court below. Judgment affirmed.

## MADDOX & RUCKER US. CUNNINGHAM.

A special jury to try a case on the grant of a new trial may be made from the regular panels of twenty-four traverse jurors.

Where a party strikes from the regular panels, and tries the case without objection, it is too late after verdict to object to the jury so stricken and trying the cause.

Sidewalks in front of a warehouse must not be obstructed by piles of cotton bales longer than is reasonably necessary to move the cotton from delivery wagons into the warehouse. A stoppage of any part of the sidewalk longer than is necessary for such transit becomes a nuisance, and if a passer-by be injured by such obstruction without negligence herself, the warehouseman is responsible in damages.

Even if the cotton bales be on the sidewalk but a reasonably necessary time for the transit from the wagons to the warehouse, and yet be placed on the sidewalk so negligently as to cause injury to the passer-by by falling on her, the warehouseman is responsible.

The evidence to the effect that the bales were set up on the ends

so as to project from the sidewalk into the street, and thereby a delivery wagon struck against them, so projecting into the street, and one fell on and injured a lady, will support a verdict of negligence, as contrary neither to law nor evidence.

Jurors. Practice in Superior Court. Damages. Negligence. Nuisance. Streets. Before Judge HILLYER. Fulton Superior Court. October Term, 1881.

Emma L. Cunningham brought suit against Maddox & Rucker, alleging that they were warehousemen in the city of Atlanta, that they had caused cotton to be placed on the sidewalk in front of their warehouse in such a manner as to obstruct free passage along the walk, and almost to block it up; that the cotton was piled in heaps which overhung passers on the sidewalk; that while plaintiff was passing this place, one of these bales fell upon her and seriously injured her; that the cotton was so piled that drays and other vehicles passing along the street would come in contact with it, and that the bale that fell upon her was either knocked down by a vehicle so passing, or fell of its own weight; and in either event the accident resulted from the negligent manner in which defendants caused their cotton to be piled on the sidewalk.

On the trial, the evidence for the plaintiff substantially supported the allegations in the declaration. It showed that a drayman, who was delivering cotton to the defendants deposited some of it upon the sidewalk and drove off; that a country wagon passing struck the cotton so deposited, and it fell upon the plaintiff.

The testimony for the defendants was to the effect that they did not own the dray; that it was necessary in their business to have cotton delivered to them on the sidewalk, thence to be taken into the warehouse. That there was no unreasonable delay in moving it, but from the nature of the business, it was necessary for the cotton to stand upon the sidewalk for a time. Defendants always in-

ructed their employés to keep the sidewalk open for assers, and this was done as far as possible.

There was much other testimony as to the nature of the injury, state of health, etc., which it is not necessary to set out here.

The jury found for the plaintiff twelve hundred and ity dollars. Defendants moved for a new trial, on the ollowing among other grounds:

- (1.) Because the verdict of the jury is contrary to the
- (2.) Because the court erred in the following proceeding a said case: When the case was called for trial, the clerk a said court, under the order of said court, presented to be parties to the case a jury list composed of the regular anels for the trial of causes generally in said court, and the court ordered the parties to strike a jury therefrom for the trial of said case, when the proper and legal list from which the jury should have been stricken for the trial of said case was the grand jury, the case being one in which a new trial had been granted.
- (3.) Because the jury which tried said case was not a egal jury, the same not being a special jury selected and tricken from the grand jury, and the verdict and judgment being, therefore, illegal.

[As to the last two grounds, the court certified that the coint was not made before the trial, but the jury was tricken without objection, and that in fact he made no uling on the point.]

Defendants also moved in arrest of judgment for the ame reasons as those set out in the last two grounds of he motion for new trial. Both motions were overruled, and defendants excepted.

McCay & Abbott, for plaintiffs in error.

HOPKINS & GLENN; VAN EPPS & CALHOUN, for de-

## JACKSON, Chief Justice.

- 1. There can be no doubt that a special jury may be stricken from the panels of traverse jurors, and so it has been adjudicated by us before. 65 Ga., 678.
- 2. Even if it had not been so determined, and were not the law, we should rule that a party, after striking and trying the cause, would not be heard to object to the jury.
- 3. The rule of law is well settled, that sidewalks are for the use of the public, and must not be obstructed so as to deprive them of that use. In front of a store or warehouse they may be used temporarily so as to pass goods from delivery wagons into the store, and cotton bales or other such commodities from the wagons to the warehouse; but care must be taken not to let the obstruction remain longer than is necessary for such purpose. If so, the obstruction becomes a nuisance; and if the passerby be injured thereby, without fault or negligence on his or her part, damages are recoverable. Wood on Nuisance, 259, 261 et seq.; Sher. & Red., 363; 6 East., 427; 3 Campbell, 230; City Code of Atlanta, 529.
- 4, 5. Even if not a nuisance per se, yet if the facts make a case of negligence in the temporary use of the sidewalk so that damage ensued to a passer-by without fault, the damage may be recovered. The fact that cotton bales were set up on end so close to the street, from the sidewalk, that a delivery wagon struck the bales and turned one over on the passer-by, is sufficient to support a verdict of damages. Controverted facts are for the jury to settle, and this court never interferes with its finding, and the approval of it by the court below, unless in case of abuse. What an agent does in the line of duty devolved on him by the superior, will make the latter responsible. Code, \$\$2194, 2201; I Thompson on Neg., 346 et seq.; Story on Agency, 452; 18 Gu., 432; 43 Ib., 586.

Judgment affirmed.

## LANGSTON, executor, vs. MARKS.

- If a petition for a citation to require an executor to appear before
  the ordinary and settle his accounts with a legatee of a decedent
  set out enough to give the court jurisdiction of the person and subject matter, it will not be dismissed on general demurrer.
- (a.) No demurrer appearing in the record, but the bill of exceptions setting out the overruling of a demurrer, we will presume it to have been a general demurrer.
- 2. The Code, (§3446) places upon one who recommences his action after a dismissal, non-suit or discontinuance, the condition of the payment of costs. Upon plea in abatement, his action will abate unless he complies with the condition.
- (a.) There is no provision for the re-commencing of an action previously dismissed by filing a pauper affidavit.
- 3. The judgment of a court of ordinary admitting a will to record is legal and binding until set aside or reversed. If it appear on the face of the proceedings that the judgment is a nullity, it may be attacked as such.
- (a.) It does not so appear in this case.
- 4. The plea of res adjudicata was not sustained by the record offered in support thereof, and the court did not err in withdrawing it from the consideration of the jury in his charge.
- 5. A legal and pertinent request to charge, which is not fully covered by the general charge, should be given.
- 6. We express no opinion as to the sufficiency of the evidence.

Pleadings. Administrators and Executors. Abatement. Costs. Actions, Wills. Evidence. Judgments. Res adjudicata. Charge of Court. Before Judge LAWSON. Jasper Superior Court. October Term, 1881.

John T. Marks cited D. M. Langston, as executor of John E. Langston, deceased, before the ordinary for settlement of his account as such executor, alleging that John E. Langston died in 1864, and by his will bequeathed him \$150.00; that said will was duly and legally probated in common form; that Langston qualified as executor and took charge of the estate in 1865. Petitioner prayed that Langston account to him for his legacy. This petition

was filed August 12th, 1879. The case was heard before the ordinary November 2d, 1879, when judgment was had for defendant, and plaintiff filed his affidavit appealing to the superior court in forma pauperis. To this defendant, Langston, filed the following pleas in abatement:

First. That at——term, 1876, of Jasper court of ordinary, Marks brought his suit for the same cause of action against defendant, which was appealed to the superior court, when at the April term, 1879, thereof said case was non-suited and dismissed; and that said plaintiff has recommenced this suit for the same cause of action and subject matter without first paying the costs in said suit so dismissed.

Second. That the pretended will of John E. Langston, under which plaintiff claims his legacy, was never legally probated and admitted to record, and its probate and record is a nullity, for the reason that its probate was not before the ordinary, but before B. T. Digby, a justice of the peace.

Third. That the defendant had never assented to the legacy.

He also pleaded to the merits that he had fully administered the estate of John E. Langston which came into his hands, and paid the same out to debts.

He further pleaded the statute of limitations of 1869. Also res adjudicata, alleging that the guardian of said plaintiff, at the September term, 1870, of the court of ordinary, brought his suit for the same cause of action, which was heard and determined by the ordinary, and a judgment pronounced thereon in favor of defendant, and the case was dismissed; that it was by plaintiff appealed to the superior court, when, at the October term, 1870, it was dismissed.

The evidence on the trial was, in brief, as follows:

Plaintiff is the nephew of John E. Langston, deceased; he never received the legacy left him by the will of his uncle. Is 27 years old; was 27 the 11th day of August last. The will of John E. Langston, by its third item, bequeathed to John T. Marks \$150.00. To this will was

ttached the affidavit of G. W. Wyatt, one of the subcribing witnesses, made before Berry T. Digby, a justice of the peace, on the 9th of March, 1865. At the May erm, 1865, of the court of ordinary, the ordinary passed on order admitting the will to record. Letters testamenary issued to D. M. Langston, dated May 9th, 1865.

In 1870, Nathan T. Marks, as guardian ad litem for John T. Marks and others, as the legatees of John E. Langston, ited the executor to settle with them. On the hearing, he following judgment was rendered:

Legatees of John E. Langston, Citation for settlement in Jasper vs.

David M. Langston.

Citation for settlement in Jasper court of ordinary, September adjourned term, 1870.

Ordinary."

An appeal was taken from this judgment, and was dismissed.

There was other testimony relating to the management of the estate by the executor, the receipt of Confederate money and loss thereof, the loss of certain debts due the estate, whether they could have been collected, etc., none of which need be set out here.

The jury found for the plaintiff \$150.00, with interest from May 9th, 1866. Defendant moved for a new trial, on the following among other grounds:

- (1.) Because the court overruled a demurrer of defendant's counsel to the petition. [No demurrer appears in the record.]
- (2.) Because the verdict was contrary to law and the
- (3) Because the court erred in striking, upon motion of plaintiff, the first plea in abatement. The plaintiff moved

to strike said plea; the court announced that if plain would amend his declaration by alleging his inability fr poverty to pay the costs accruing on the former suit, the same cause of action and dismissed at the April te 1879, he would strike said plea. Plaintiff having amended his said declaration, the court struck the pleasure.

(4.) Because the court admitted in evidence, over objection of defendant's counsel, the copy of the will order admitting the same to record, and overruled

second plea in abatement.

(5.) Because the court refused to charge the jury, who so requested in writing by defendant's counsel, on subject of the plea of res adjudicata, that the judgm of the court of ordinary, if any such has been introducin evidence, adjudging that the legatees of John E. Laston were bound by the statute of limitations so fathe matter, and transactions arising prior to June 1st, 18 is conclusive upon all the parties thereto; and if plain was a party to a suit in which such judgment was render then he is concluded thereby.

(6.) Because the court erred in charging the jury the plea of res adjudicata was not sustained by the recontroduced, and was, therefore, overruled, and the j should not consider the plea of res adjudicata.

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(14.) Because the court erred in refusing to charge jury, at the request of counsel for defendant, made writing, "that if the jury believe from the evidence to the defendant acted in the sale of the property of sestate and the collection of the debts and notes of sestate at the time in the manner that prudent men act and managed their own affairs, and failed to collect sedebts by no fault of his, then he should not be he liable for failure to collect such debts." Instead of the court charged as follows: "The defendant is charge ble with all money that came into his hands after appointment as executor, or that ought to have come in his hands by use of ordinary diligence; ordinary diligence.

that care which prudent men exercise in the management of business."

The motion was overruled, and defendant excepted.

G. T. & C. L. BARTLETT, for plaintiff in error.

KEY & PRESTON; JACKSON & KING, for defendant.

ERAWFORD, Justice.

John T. Marks, claiming to be a legatee under the will f John E. Langston, deceased, cited David M. Langston of appear before the ordinary of Jasper county, to submit to a settlement of his accounts as the executor of said eceased, and to pay over to him such amount as might edue him under said will.

The executor appeared and answered the citation. The rdinary, at the hearing of said case, gave judgment gainst the petitioner, Marks, and in favor of Langston, he executor. Marks appealed to the superior court, there he obtained judgment against the executor for the 11m of \$150.00, with interest from the 9th of May, 1866. The executor brings the case to this court, asking to set side the verdict and judgment thus obtained, on account f the errors alleged to have been committed on the trial.

- 1. The first ground of error relied upon is a demurrer to the petition of the plaintiff, which demurrer, not being bund in the record nor in the bill of exceptions, we are nable to pass satisfactorily upon it; but supposing it to e a general demurrer to the petition, we see no error in its being overruled. This proceeding before the ordinary by common petition, for the purpose simply of having that officer cite the administrator, executor or guardian to prear before him for a settlement of his accounts, and equires that enough shall be set out to give the court justication of the person and subject-matter, and when so one we do not see that it is demurrable.
- 2. The next ground of error which we consider is the

ruling of the court on plaintiff's motion to strike the first plea in abatement filed by defendant, and in which it was alleged that the plaintiff had brought his suit to the court of ordinary for the same cause of action, that it had been appealed to the superior court where it had been dismissed, and that this suit had been recommenced without the payment of costs as required by law.

Upon this motion to strike, the court announced that plaintiff would amend his petition and set forth that the failure to pay was owing to his inability from povert that then he would sustain the motion to strike, and the amendment having been made, the said plea was stricked.

Section 3446 of the Code provides that in all case where there is a non-suit, dismission or discontinuance a case, that the plaintiff may recommence his suit on the payment of costs. We have searched for the authority by which a pauper affidavit may be made in lieu of the statutory requirement. There is no case where such legal right is granted, except upon special legal provision. It required a statute to authorize it in appeals, in claim in application for a supersedeas, in cases brought to the court, as well as to relieve parties from costs here when the usual pauper oath is filed in the court below.

It may be said that the ruling of the judge below fal within the spirit of our legislation; yet, whenever courgo beyond the provisions of the law, because their judgment is that their rulings are within the spirit of the law we do but substitute as many varied views of what fal within its spirit as there are judges pronouncing it. Withink, therefore, that whenever a statute requires a particular thing to be done to entitle a citizen to the enjoyment of a right, he must comply with the requirements before he can enjoy the right. And we are of opinion that he might so comply when the point was made against he proceeding with his second suit. There may be good reson why there has been no legislation upon this subject as may be illustrated by this case.

In 1870 this executor was cited before the ordinary settle this same estate; after the hearing, his judgment as for the defendant; the plaintiff appealed, and before a superior court it was dismissed; again in 1876 this aintiff brought the executor before the ordinary whose digment was appealed from, and again it is alleged that was dismissed by the judgment of the superior court; are again in 1879 the plaintiff cites the executor before a ordinary in this suit, and it is on its trial in the superior court that he is met by the plea of the non-payment costs under the statute, and the ruling complained of ade.

3. Another important question made by the record is e admission of the will of the testator in evidence over e objection of defendant, because of the illegal manner which it was claimed that the same had been probated. is perhaps needless to say that the judgments of the ourts of ordinary in this state in matters appertaining to ills, are judgments of courts of general jurisdiction, and ust be recognized as legal and binding until set aside or eversed. If, however, it should appear on the face of the roceedings that the judgment rendered was a nullity, as insisted upon here, then of course it should be so held. In the present case, if nothing else appeared than what ne defendant desired to put in evidence, it might be held nat the proceeding before the ordinary of March 6th, 865, was not a proper probate of the testator's will; ut the order and judgment passed at the May term, 865, relieves the question of all embarrassment.

Besides this the defendant accepted letters testamenary, was qualified under the rule, and proceeded to administer the estate under its direction.

4. The plea of res adjudicata covered by two of the rounds of the motion for a new trial was not sustained by the proof, and therefore the judge committed r.o error refusing to charge as requested, nor in giving the charge accepted to.

Hall vs. Gay.

- 5. The request to charge as set out in the 14th groun of the motion for a new trial touching the good faith, d igence and prudence with which the executor was require to act, was not fully covered by what was charged, as we think that the request to charge should have be given.
- 6. As the case must be remanded for a new trial, express no opinion as to the sufficiency of the eviden to support the verdict.

Judgment reversed.

#### HALL E'S. GAY.

Actual adverse possession of lands for twenty years gives good ti by prescription against every one except the state or persons labori under disabilities. The possession must be in the right of the possession sessor, and must not have originated in fraud; but fraud will a be presumed unless proved.

(a.) A prescription by mere possession will not extend beyond t

actual possessio pedis of the prescriber.

Title. Prescription. Ejectment. Before W. H. W. LEY, ESQ., Judge pro hac vice. Laurens Superior Cou August Term, 1881.

Reported in the decision.

D. M. ROBERTS; C. C. SMITH, for plaintiff in error.

No appearance for defendant.

CRAWFORD, Justice.

L. A. Hall brought his action of ejectment again Isaac Gay, to recover lot of land No. 285, in the 12 district of Laurens county. The plaintiff relied upo a grant from the state, with a chain of title to his self; the defendant relied upon twenty years adverse po session. The jury found for the defendant, whereupo the plaintiff asked for a new trial, because the verdi Hall vs. Gay.

s contrary to evidence, contrary to law, and contrary to e charge of the court. The refusal to grant the new all is the error alleged.

The proof shows that the defendant went into possesn of the land in dispute in 1855, and suit was brought
the October term, 1879, of Laurens superior court.
the defendant first built a shop upon the land, then his
relling-house, in which he had lived continuously from
the first settlement. He had forty-five or fifty acres of
and enclosed and in cultivation, he commenced by clearthe one or two acres, then ten or twelve, and increased
the quantity up to forty-five or fifty. His acts of ownertip, as he claimed, were exercised over all the lot; but
at part of it which was unenclosed only by cutting rail
d board timber and house logs whenever he desired.

We think that the court erred in not granting a newial; for whilst under the law and the testimony the verct for the defendant was right under his prescriptive de of twenty years, the same could not extend beyond e actual possessio pedis of the defendant, and the verdict eyond that limit was contrary to law.

"Actual adverse possession of land by itself for twenyears gives a good title by prescription against every ie, except the state, or persons laboring under disabilies." Code, §2682. No paper title is necessary, nothing it actual bona fide possession, this is all which the law quires. The possession which the law makes the fountion of a prescriptive title must be in the right of the ossessor, and not of another, and must not have origined in fraud. Code, §2679.

No fraud was shown in this case, and none is to be preimed. "When a party claims adversely, it is not necestry for him to show that he went into possession bona de." Evans vs. Baird, 44 Ga., 645.

Possession accompanied by acts of ownership is preamed to be lawful until the contrary appears.

Judgment reversed.

Willis vs. Fincher.

### WILLIS vs. FINCHER.

1. A garnishee summoned on the second day of December, 1880, answer a garnishment in a justice's court was relieved of the necesity of making such answer in ten days, as required by section 41 of the Code, by the act of December 6th, 1880, extending the time within which answers of garnishees must be made.

Exceptions to the answer of a garnishee on the ground of insu ciency are too late when not made until thirty days or more ha

elapsed from the time of filing such answer.

Garnishment. Practice. Justice Courts. Before Jud. STEWART. Pike Superior Court. October Term, 1881

Willis obtained judgment against Fincher in a justice court at the December term of said court. On December 2d he garnished one Fincher, the process being returnable to the next (January) term of the court, which wheld on the first Saturday in January, 1881. The gard shee answered on January 1st, that he was not indebte to the defendant. No traverse was filed. At the Feruary term of the justice's court the docket was regular called, when plaintiff moved the court to strike the asswer of Fincher upon two grounds:

(1.) Because it was insufficient in law and not respo sive to the summons.

(2.) Because it was not filed in the time required to law, to-wit, ten days from the service of garnishment. The justice overruled the motion, and the case was carried to the superior court by *certiorari*, and there the judiment of the magistrate was affirmed, and plaintiff excepted.

HENRY WALKER, for plaintiff in error.

E. F. DUPREE; J. F. REDDING, for defendant.

Willis vs. Fincher.

## SPEER, Justice.

ver for any cause.

1. One of the questions made by this record is whether a person summoned to answer a garnishment returnable to a regular term of a justice's court and service of which was nade on him on the second day of December, 1880, was bound to answer within ten days from the service, as provided by section 4161 of the Code, or was the privilege extended to him of answering "at the term to which the carnishment is returnable," as provided by the act approved 6th December, 1880, amending said section.

The procedures of courts are always subject to legislaion. The amended act of 6th December, 1880, repealed he ten days' limitation of the 4161st section of the Code, nd the duty and direction it imposed ceased to exist. he amended act was remedial, and should be liberally onstrued, and under it we hold the right and privilege ere extended to the garnishee to answer at the term to hich the garnishment was returnable; and especially is nis so, when at the passage of the act the garnishee had ot forfeited his right to answer under section 4161, as ne ten days had not expired from the date of the service. 2. The second question made in the record, whether ne court should have stricken the answer as made at the rm to which the summons of garnishment was returnae as being insufficient in law, we do not deem it necsary to pass upon as made, as in our opinion, from the cord, it was too late for plaintiff to object to the an-

It does not appear from the record on what ground the ourt overruled the demurrer to the answer, and if for my good cause he was right, his judgment will be susined.

It appears the answer to the summons of garnishment as made 1st January, 1881, and no exceptions or traverse said answer were made before the February term, 1881, airty days or more after the answer was made. Section

Cox vs. The East Tennessee Virginia and Georgia Railroad.

4162 of the Code provides: "If the plaintiff in such su desires to traverse the answer of the garnishee he shall deso within ten days after the same is filed, and not after Exceptions to the sufficiency of an answer must necessarily precede filing a traverse to the same, and, we think a reasonable construction of the statute is that all objections to the legality, insufficiency, or the traverse of a answer must be made within ten days from the filing, an not after. The policy of the law is speedily to dispos of these collateral issues that often involve innocent parties who have no interest in the other litigation. In garnishments returnable to the superior court traverses must be filed at the first term and issues thereon are triable at the same term. Code, §3306.

Judgment affirmed.

## COX vs. THE EAST TENNESSEE, VIRGINIA AND GEORGI RAILROAD.

- 1. When a case has been removed from a state court to the circu court of the United States, the jurisdiction of the former cease and after non-suit in the federal court, the case cannot be renewed in the state court within six months, so as to avoid the statute of limitations. Section 2932 of the Code does not apply to such case.
- 2. Railroad companies are required to keep in proper repair public roads or private ways established by law where they cross the railroad, and to build suitable bridges or make proper excavations of embankments. But they are not required to build bridges for crossings which are neither public nor private ways established belaw; nor are they responsible for damages resulting from the construction of a bridge narrower than the road at such a crossing.

Statute of Limitations. United States Courts. Non suits. Railroads. Roads and Bridges. Damages. Before Judge FAIN. Whitfield Superior Court. October Term, 1881.

Cox sued the East Tennessee, Virginia and Georgia

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Cox vs. The East Tennessee Virginia and Georgia Railroad.

Railroad for \$500.00 damages for injuries sustained by his wife by reason of her falling out of a wagon in crossing the defendant's track. The case was originally brought in the superior court of Whitfield county, was removed by the defendant to the United States circuit court, and that court granted a non-suit. Within less than six months plaintiff again brought his action, on the same grounds, in the superior court of Whitfield county. alleged in his declaration, and attempted to show, that the crossing at which the injury occurred was a private crossing on his farm, but had been kept in repair by defendant for a number of years, and had been used by plaintiff all during that time to go from one part of his farm to the other; that after so keeping the crossing in repair, defendant had neglected to fix the same, and that the accident to his wife resulted from the dilapidated condition of the crossing. The cause of action arose in 1874, the present suit was brought in 1880. To avoid the bar of the statute of limitations plaintiff proved that he had commenced his suit for the same cause of action in January, 1876: that it had been removed to the circuit court of the United States, and on the trial there a non-suit had been granted within less than six months before the commencement of this case. Plaintiff here closed his case, and on motion of 'defendant's counsel, the court granted a nonsuit. to which the plaintiff excepted.

J. A. R. HANKS; JOHNSON & McCAMY, for plaintiff in error.

MCCUTCHEN & SHUMATE, for defendant.

JACKSON, Chief Justice.

A non-suit was granted in this case at the close of plaintiff's testimony, and the error assigned is the judgment of non-suit.

1. The same cause had been brought before and removed to the circuit court of the United States for the northern

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Cox vs. The East Tennessee, Virginia and Georgia Railroad.

district of Georgia. There, on trial before that court, a the close of plaintiff's evidence, a nor-suit was awarded and thereupon in the state court the suit was renewed, ur der and by virtue of the six months' right to renew i under our statute, codified in section 2932 of the Code which reads as follows: "If a plaintiff shall be non-suited or shall discontinue or dismiss his case, and shall recon mence within six months, such renewed case shall stan upon the same footing as to limitation with the origina case." To be thus renewed it must be the same case a to cause of action and parties; and this is identicall the same case in both respects. So that the question i can a case which has been removed to the United State circuit court be renewed in the state court. We thin not, because the act of removal ipso facto transfers h jurisdiction of the cause to the circuit court of the Un ted States, and divests that of the state court. So that by the ruling of the supreme court of the United State in the case of Kern vs. Hindekoper, 13 Otto, 485, at th October term, 1880, all further proceedings in the stat courts are coram non judice and void. Therefore, when appeared that plaintiff himself proved, in order to tak his case without the statute of limitations, that it ha been removed and adjudicated by the United States cour he proved himself out of court, and was properly nor suited.

2. Moreover the accident by which his wife was injured occurred at a crossing over the railroad which was neither a public road nor a private way established by law His suit for damages rests on the defect of a bridge over the railroad in his farm by which he crossed from one part to another of the farm. Section 706 of the Code enacts that, "all railroad companies shall keep in good or der at their expense, the public roads or private ways established pursuant to law, when crossed by their several roads, and build suitable bridges, and make proper excavations or embankments, according to the spirit of the road laws."

Hall, administrator, vs. Armor et al, by next friend.

By this statute they are to build the bridges and keep in repair the roads, including the bridges so built of course, if those roads are public roads, or if they are private ways established pursuant to law. What private ways are established pursuant to law? The answer is found in article V., of chapter V., title VI., part I of the Code, which is on the subject of private ways and the manner in which they are established pursuant to law, and a record thereof expt in the road book and the way fully described therein. Section 727 of the Code.

There is no proof that any such private way was established and described and recorded in this case. On the contrary, it is admitted by the plaintiff in his testimony hat nothing of the sort was done. Therefore it was not he duty of the railroad company to build and keep in repair this bridge, and it incurred no liability to answer in lamages for the accident because the bridge may have been narrower than the law required.

The non-suit was right, then, on this ground also. Judgment affirmed.

## HALL, administrator, vs. ARMOR et al., by next friend.

- On the trial of a claim interposed to an administrator's sale, the issue is whether or not the property is subject to such sale. An administrator cannot sell property held adversely to the estate by a third person; he must first recover possession. Therefore, where it appeared that another than the administrator held adverse possession of the land at the time it was advertised for sale, a verdict for the claimant was a necessary consequence.
- c.) Errors which could not have affected the result of a trial will not necessitate a new trial.
- In a claim case under an administrator's sale, where it appears that another than the administrator is in possession of the land, claiming adversely under a deed, it is immaterial to attack the deed as invalid; it still serves as an evidence of adverse possession.
- Nor does it matter that such land was appraised at the instance of the administrator; such appraisement does not amount to an eviction of one in adverse possession.

Hall, administrator, vs. Armor et al., by next friend.

4. An administrator is estopped from attacking the deed of his in tate as completely as the latter would have been estopped.

Administrators and Executors. Claims. Title. In dence. Before Judge LAWSON. Greene Superior Con September Term, 1881.

Hall, as administrator of the estate of Reuben Armor, was proceeding to sell the real estate of said testate, when a claim to seven hundred and fifty acre land was interposed by Geo. A. Armor and Vernon Arr through Spivey, as their next friend.

The claimants relied upon a deed made by the in tate to them on April 20th, 1876, conveying the trace land in controversy. Claimants were in possession of land at the time of the attempted sale by the administor. The land had been appraised by the commission as part of the real estate of the intestate, and an ohad been granted by the ordinary authorizing the salthe real estate of said intestate.

The administrator claimed that the deed was voice the ground that at the time it was made his intestate not the capacity to make it, on account of the loss of mind, and that claimants went into possession of the p fraudulently. The jury found a verdict in favor of claimants. The plaintiff moved for a new trial, on following among other grounds:

- (1.) Because the verdict was contrary to law and dence.
- (2.) Because the court erred in refusing to allow of sel to introduce in evidence the inventory and apprenent of the estate of the intestate, for the purpose showing that intestate owned very little personal proper at the time of his death, and that he owned no real est besides the Ward place, the land in controversy, except the home place, and that the land of the home place, side of that which had been assigned as dower to widow, was of but little value.

Hall, administrator, vs. Armor et al., by next friend.

(3.) Because the court refused to admit evidence offered for the purpose of showing that intestate was insolvent when he made the deed under which claimants hold, and that it was fraudulent.

The motion was overruled, and the administrator excepted.

C. HEARD; P. B. ROBINSON, for plaintiff in error.

H. T. & H. G. LEWIS, for defendant.

JACKSON, Chief Justice.

1. The controlling question in this case is whether the administrator can sell realty if it be in the adverse possession of another, until he has reduced it to possession. He offered for sale a tract of land, it was claimed by the defendant in error, and the question at issue arose on this claim. The jury found for the claimants, and the denial of the motion by the administrator for a new trial is the judgment assigned for error on many grounds made in that motion. It is wholly immaterial whether the court erred in any or all the rulings on the admissibility of evidence, and the instructions to the jury, and the competency of the juror, if the evidence required the verdict; because it would be a vain thing, without possible good to the administrator, and with the expense of another trial for nothing to the county, to grant a new trial which must result just as the trial complained of has done, if the claimants were in possession adversely to the estate when the land was advertised for sale. Code, §2564. That section is quite plain. It declares that, "an administrator cannot sell property held adversely to the estate by a third person; he must first recover possession." The reason of the law is obvious. Who shall give the purchaser possession? How shall the third person occupying adversely be turned out? No officer of the law can either turn out the third person, or put in the purchasHall, administrator, vs. Armor et al., by next friend.

er. Besides, who will buy a law-suit and give full price for property? Therefore, for the protection of the estable the law requires the administrator to reduce to possession so as to deliver property when he sells it, and therefore an undisputed title and actual possession, and make the property bring its full value for the benefit of theirs and creditors.

The trial of the claim is to be conducted, in case claim is interposed, just as a claim is tried in case of le of executions by the sheriffs, and claim of property it terposed there. The issue is made up, and the questic is subject or not subject to be sold by the administrate and the moment the fact appears that the property is the possession of an adverse holder, and was so when a vertised for sale, that issue must be determined in the negative—not subject,—because the statute says he should not such property until he has recovered the possion. Code, §3743 et seq. These sections show how the trial is to be had, and the issue to be made as in claims property levied on by executions.

So that the question is one of fact—were the claimar in possession at the time the land was advertised for sal

Of that there is no doubt, from the facts in this reco Was that possession adverse? Of that there is as lit doubt. They held under a deed, in their own right, und claim of right, and, therefore, adversely to all the wor the estate included, and not as heirs at law of the descen ant, but donees—not by descent, but by purchase.

2. It matters not that this deed was attacked as inval or fraudulent, or for any other reason. It was the waten evidence of their adverse claim of title, and show that they claimed adversely to the estate; and having that a land in actual possession under this claim, it was not sue ject to be sold until by ejectment or otherwise, if there under the facts of the particular case any other remeto recover possession, the land was recovered by the aministrator.

Parker vs. Martin et al.

3, 4. Nor does it matter that the land was appraised by e administrator, because the estimating its value by apraisers is no eviction of those in possession, and no reaction to possession by the administrator. 64 Ga., 11. Doubtless, it was this view of the law of this case which duced the court below to exclude the evidence of independence of the estate and the fraudulent nature of the enveyance to the claimants, coupled with the other qually strong view that it did not lie in the mouth of the dministrator to attack the deed of his intestate, but that e was estopped as completely as the intestate donor rould have been. 19 Ga., 290; 22 Ib., 432.

Moreover, it was this view, doubtless, which also inuced the judge to say, when he overruled the motion for new trial, that "the verdict under the evidence and the nw, as given in charge, could not have been otherwise, and, therefore, the motion for a new trial is refused."

Agreeing with the presiding judge in this view, the vidence and the law of the case compelling the verdict, ne judgment is affirmed.

## PARKER vs. MARTIN et al.

A plaintiff in ejectment must recover on the strength of his own title. A sheriff's deed, with proof of title in the defendant in f. fa. or of possession in him after the judgment, will change the onus, but the sheriff's deed alone will not.

Where one of the plaintiff's witnesses absented himself from the court-room, and when called did not respond, but the plaintiff made no motion for continuance, merely proceeding without him, his testimony could not be ranked as newly discovered, and formed no ground for a new trial.

Ejectment. Title. New Trial. Before Judge WELL-ORN. Lumpkin Superior Court. October Term, 1881.

Parker brought ejectment against Martin et al. He lied on the trial upon a sheriff's deed made in 1879, un-

Parker vs Martin et al.

der a judgment against one Hamilton, which was recovered in 1869. He also introduced testimony to show that some years before the judgment Hamilton had prospected for gold on the land, and that no one else had been in actual possession, the land being vacant, until Martin put a house on it in 1879, and placed one Burgess in it.

Defendants relied on prescription in Martin under adeed made to him in 1852, by one William Martin, administrator. On the subject of actual possession by defendant, Martin, the evidence for the two sides was conflicting. The jury found for the defendants. Plaintiff moved for a new trial on the following grounds:

- (1.) Because the verdict was contrary to law and evidence.
- (2.) Because of newly discovered testimony. [This ground rested on the fact that plaintiff went to trial supposing a witness who had been subpænaed by him was at court, but after going into the case he found the witness was not there. No motion was made for a continuance, but the case proceeded.]

The motion was overruled, and plaintiff excepted.

WIER BOYD; M. G. BOYD, for plaintiff in error.

S. D. IRVIN, for defendants.

JACKSON, Chief Justice.

1. The plaintiff in ejectment must recover on the strength of his own title. In this case he relies on a sheriff's deed, but there is no proof of title in the defendant in execution, nor of possession in that defendant since the rendition of the judgment. The sheriff's deed, aided by proof of title in defendant in execution, or possession since judgment, would cast the *onus* on the defendant in ejectment. 9 Ga, 74, et séq.; but in this case it is not shown that Hamilton had title or possession since judgment against him, and the naked sheriff's deed will not avail.

Chapman vs. Floyd.

2. There is nothing in the point of newly discovered testimony. It is not newly discovered. The witness was in court and left; when called, he did not respond; the plaintiff made no motion to continue because the witness was not present, but risked the trial in his absence and without his evidence. Having risked and lost, it is too late now to complain. He can complain only of himself. The defendant did him no wrong, and the court denied him no right.

Judgment affirmed.

### CHAPMAN vs. FLOYD.

- I. While a justice can not set aside his own judgment and grant a new trial, yet where he has rendered a void judgment, he may treat it as a nullity, and proceed as though it had not been rendered.
- 2. If one dedicated land to the public for school purposes, and the dedication was accepted, possession taken, improvements made, capital invested, and the premises used and occupied for such a length of time as that the public accommodation would be affected by an interruption of the enjoyment, then the public (represented by the authorities of the school) would stand in the position of a purchaser for value.
- Prior to 1859 a deed made by one person whilst another held adverse possession of the land, was void.
- (a.) The act of 1859 (Code, §2695) was not retroactive.
- 4. Where error is assigned on the failure of the judge to charge fully concerning a certain part of the case, if neither what was given nor what was omitted appears, this court cannot consider the exception.
- 5. To entitle a deed less than thirty years old to be admitted in evidence without proof of execution, it must be properly recorded in the county where the land lies. Record in another county will avail nothing.
- This ground of error is controlled by the ruling in the second headnote.
- (a.) A request not founded on the evidence was properly refused.
- 7. The affidavits amply purged the juryman attacked as partial.

Justice Courts. Judgments. Nullities. Dedication.

#### Chapman vs. Floyd.

Title. Deeds. Laws. Evidence. Jury. New Trial. Practice in Supreme Court. Before Judge HARRIS. Campbell Superior Court. August Term, 1881.

Reported in the decision.

JNO. S. BIGBY; ROAN & ROSSER, for plaintiffs in error.

R. T. DORSEY; P. H. BREWSTER; A. C. KING, for defendant.

CRAWFORD, Justice.

This was a claim case; E. Floyd was the plaintiff in fi. fa.; the Fairburn Academy the defendant in fi. fa.; E. B. Chapman the claimant; the fi. fa. issued from a justice's court January 21st, 1881; the levy was on the Fairburn Academy, and the land on which it stood—the defendant in possession at the date of the levy.

The land on the trial was shown to have been in the possession of one McBride in 1847-8. The claimant rested his title on a deed from the trustees of the Methodist E. church, who claimed under a deed from the Atlanta & LaGrange Railroad Company, which claimed under a deed from Moore, Austell and Camp, into whom claimant sought to put title from McBride, but failed.

The Fairburn Academy claimed title by virtue of a dedication from McBride to the public for school purposes, which dedication had been accepted, the property improved by building upon it, and used for school purposes since the dedication in 1848.

Upon these two lines of title the case was tried—the jury found for the Academy and against the claimant, that is they found the property subject to the execution.

The claimant seeks to get rid of that finding by a motion for a new trial, and alleges that the errors which were committed thereon entitle him to such new trial.

1. The first error upon which he relies is that the judge erred in refusing to exclude from the jury the fi. fa. un-

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r which the levy was made, because it recited that it is issued upon a judgment rendered in January, 1881, nen it should have recited that it was issued upon a digment rendered in December, 1880.

In connection with the motion to exclude, it appeared at the original suit was against the "Fairburn Academy," ilst the judgment rendered in December, 1880, was ainst the trustees in their individual names. nuary term, 1881, of the court, the magistrate entered a judgment against the real defendant, the "Fairrn Academy," and from this judgment the fi. fa. was ued. So far as the record shows, there was no fi. fa. ued from the judgment rendered in December, 1880; there had been it would have been void, and the magrate had the right so to consider it, as well as the judgent on which it was founded. Whilst a justice of the ace has no power to set aside his own judgment, and int a new trial, yet where he renders a void judgment, may disregard it and treat it as a nullity. 55 Ga., 410. 2. The second ground of error is that the court charged jury: "If this land had been dedicated to the public school purposes, had been accepted, possession taken, provements made, capital invested, and the premises d and occupied for such a length of time as that the blic accommodation would be affected by an interrupn of the enjoyment, then the public stood in the posin of a purchaser for value, and it would be their duty find the property subject. The effect of finding the perty subject was to find the title in the Fairburn ademy, the defendant in the execution."

This charge of the judge is fully authorized by §2684 the Code, and the ruling of this court in the 12th Ga.,

The next error assigned is because the judge charged at a deed made prior to the year 1859 by one person, ilst another held adverse possession of the land, conved no title to the grantee. If, therefore, Austell, Moore

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and Camp conveyed the land in controversy to the Atlanta and LaGrange Railroad Company, whilst the public was holding it adversely to them, under the dedication to the public for school purposes, the railroad company took no title to the same. And if the deed to the trustees of the Methodist church was made whilst the land in controversy was held adversely to the railroad company, then the deed would convey no title to the said trustees.

This charge is supported by the decisions in the 18th Ga., 181; 32 Ib., 182; 37 Ib., 5.

The act of 1859 applied to deeds made after its passage.

- 4. The fourth ground of error insisted upon is, that the judge, after charging upon the subject of adverse possession, failed to charge as to what constituted adverse possession. Where an exception is taken to the charge of the court and the same is not set out in the record or in the bill of exceptions, this court cannot consider it; and where it is claimed that there is an omission to charge, and neither that which is given nor that which is omitted appears, this court cannot consider it.
- 5. The next assignment of error is that the court refused to allow read in evidence a certified copy of a deed made in 1849 by McBride to Smith, Moore and Austell to certain lands lying partly in Fayette and partly in Campbell county, said deed including the land upon which the Academy stood. To entitle a deed not being over thirty years old to be admitted in evidence without proof of execution it must be properly recorded in the county where the land lies. Code, §\$2705, 2712.

This deed having been recorded in Fayette county did not meet the requirements of the law as to registration, so as to allow it to be read in evidence without proof touching lands in the county of Campbell.

6. Because the court refused to charge as requested that if the school authorities held the land upon which the school-house stood by virtue of a dedication from

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aimant, or any one under whom he held, then the posession so held would not be adverse and it would be the uty of the jury to find the property not subject.

The question made by this request to charge is ruled the second assignment of error. Besides, the defendant in fi. fa. did not hold under the claimant nor from my one under whom he held, and for that reason the reasal to charge as requested was not error.

7. The last ground of error relied upon is that Torrance, he foreman of the jury, was not an impartial juror, and id not act impartially during the pendency of the trial. The affidavits submitted to the judge in his opinion amply urged the juror, and they so appear to us.

Judgment affirmed.

### MCWILLIAMS vs. MCWILLIAMS et al.

- . Where interrogatories are prepared for a witness, his residence must be stated therein, if known.
- a.) It is not necessary to make objection to the interrogatories on that ground before the issuance of commission. We would suggest, however, that it would be well to enlarge the rule of court so as to require all objections which go to the application for a commission to be made before such commission is issued.
- Where a husband and father, as head of his family, applied for a homestead, a failure to allege out of whose property it was to be carved was not such a fatal defect as would render the proceeding void. The presumption would be that the homestead was to be carved out of his estate.
- a.) Especially was the proceeding not void in this case where the application asked that a homestead should be set apart out of the place on which the applicant lived.

Interrogatories. Practice in Superior Court. Hometead. Presumption. Before Judge HARRIS. Coweta Superior Court. September Term, 1881.

Reported in the decision.

McWilliams vs. McWilliams et al.

R. S. BURCH; J. W. POWELL; W. A. TURNER, for plaintiff in error.

J. B. S. DAVIS; J. S. BIGBY, for defendants.

JACKSON, Chief Justice.

Two questions are made in the motion for a new trial in this case: first, must interrogatories state the place of residence of witness, and if so, must the objection to their admissibility be made before commission issues, as in case of leading questions? and secondly, where husband and father applies for homestead must the application show out of whose property it is to be carved, and without such affirmative allegation is the homestead void?

- I. In respect to the first question the Code is explicit that the residence must be stated if known, Code, §387c; but it is insisted that objection should be made as in case of leading questions when the party is served with the interrogatories. The rule of court which requires that objection to leading questions must be made before the issue of commission does not embrace the residence of the witness. We cannot say, therefore, that the law requires the objection to be then made in positive terms: but the reason on which that rule is founded ought to cover it, and it would be well to extend the rule to embrace this and all other objections which go to the application for the commission and not to the execution of it afterward. It is not for us, however, to make the rules for the superior courts, but only to construe them; and we cannot construe this rule to embrace this subject matter, because it is confined to leading questions.
- 2. The second point is covered by the ruling at the last term in the case of Wilder & Sons vs. Frederick, not yet reported. There it is ruled that where the husband and father applies, the presumption is that the application is that the homestead be carved out of his own property; and it must be so, because the head of the family is usu-

Harris vs. Smith.

ally the owner of the property of the household, and he has no right to have it taken out of any other property than his own. In this case that presumption is strengthened by the allegation in the application that it is to be carved out of the property, describing it fully, "where he resides." That notifies all creditors, and it is for them to take notice that their debtor's residence and the surrounding lands described are about to be taken from under the cover of their claims, and they must govern themselves accordingly. If the application, therefore, was sufficiently explicit, it and the balance of the record of the homestead estate, there being no other objection raised, should have gone to the jury, and the court erred in rejecting them.

Judgment reversed.

## HARRIS vs. SMITH.

An action by a defendant in f. fa. against the sheriff for the balance of funds in his hands arising from a sale under the f. fa. after paying it off, is barred in four years.

(a.) The provision in §2916 of the Code that suits for the enforcement of rights arising under statutes, acts of incorporation, "or by operation of law" should be barred in twenty years, was not intended to include every case of implied assumpsit, but the last clause applied to such rights as arose in connection with or through statutes or acts of incorporation, though not strictly under the very words thereof.

Contracts. Laws. Statute of Limitations. Before Judge HOOD. Randolph Superior Court. November Term, 1881.

Reported in the decision.

JOHN T. CLARKE & SON, for plaintiff in error.

KENNON & HOOD, for defendant.

Harris vs. Smith.

## CRAWFORD, Justice.

In May, 1875, L. A. Smith, the defendant in error, sold, as sheriff of Randolph county, under execution, certain property of James M. Harris, the defendant in error, and after settling the fi. fa. in full, there remained of the money arising from the sale, as alleged by Harris, \$122.60.

At the May term, 1881, of the superior court for said county, Harris brought a rule against Smith for this money. In answer to the rule Smith showed for cause payment, and the statute of limitations of four years.

Counsel for movant demurred to the plea of the statute of limitations, on the ground that this liability arose by operation of law, and that the statutory bar was twenty years. The demurrer was overruled, and that is the error assigned.

It is admitted that prior to the act of 1855-6, Code, \$2916, sheriffs were protected by the four years statute of limitations, but by that act it was changed to twenty.

It declares that all suits for the enforcement of rights arising under statutes, acts of incorporation, or by operation of law shall be brought in twenty years after the right of action accrues.

We cannot concur with the learned counsel who argued this case, that the words relied upon were ever intended to apply to such a liability as that which is made by this record.

But, if it is asked, if they do not refer to such a case, then to what class of cases were they intended to apply? In looking at the act itself, we find that the legislature was dealing with rights accruing to individuals under statutes, and acts of incorporation, the latter of which, especially about the date of the passage of the act, had given rise to great litigation in the state. In some of the cases growing out of both statutory and charter liabilities of parties, it was held that obligations arose which were "quasi ex contractu, and imposed by operation of mere

The Mechanics' and Traders' Bank of Rome et al. vs. Harrison, executor, et al.

aw." Banks vs. Darden, 18 Ga., 341. Looking at the act and the judicial decisions of the times, it would seem that these words were intended to apply to such rights as arise in connection with, though not strictly under, the very words of the statutes or acts of incorporation.

But that it does not apply to the case before us we think very clear; if, indeed, it were made so to apply, we are at a loss to see where it would stop; for every right to recover arises in some way by operation of law, and if we stick to the letter of this act there would be but few cases barred by the statute of four years.

The books are full of authority to the effect that "whenever there is a right on one side and a duty on the other, founded on a sufficient consideration, the law implies a contract, and an action will lie for its enforcement."

All actions, says the Code, arising upon any implied assumpsit or undertaking, must be brought in four years after the right accrues. This liability falls beyond question under this section, and the court was right in overruling the demurrer. 9 Ga., 413.

Judgment affirmed.

# THE MECHANICS' AND TRADERS' BANK OF ROME et al. vs. HARRISON, executor, et al.

- A case may be brought to this court upon the rendition of a final
  judgment therein, or upon the refusal of a judgment which would
  have finally disposed of the case had it been rendered as contended
  for by the excepting party.
- (a.) Interlocutory exceptions cannot be considered in this court until a final disposition of the case in the court below. Therefore, on exception to the overruling of a demurrer to a bill in equity, interlocutory exceptions to rulings made in the progress of the case prior to the demurrer cannot be considered.
- (b.) Permission granted to file such exceptions pendente lite.
- Where some of the defendants to a bill in equity except to the overruling of a demurrer to the bill, they need not serve their codefendants with the bill of exceptions.

- On the hearing of the application for injunction, the question concerns the granting of that writ alone, and a decision on it does not preclude a demurrer filed thereafter for want of equity in the bill.
- 4. That certain exceptions cannot be heard will not work a dismissal of the writ of error, if other exceptions properly taken remain.
- 5. Where the proper management of a trust estate, the execution of its trusts and the determination of claims against it were involved, a bill for direction and to prevent a multiplicity of suits was not without equity.
- 6. A foreign executor may sue in this state like any other litigant, upon complying with the conditions required of him. Code, §2414.
- The will of a non-resident which conveys realty in this state, is to be construed as to such realty in accordance with the laws of this state.

Practice in Supreme Court. Administrators and Executors. Wills. Before Judge SNEAD. Richmond Superior Court. October Term, 1881.

To the facts reported in the decision it is only necessary to add the following: Harrison, executor, filed his bill against the Mechanics' and Traders' Bank et al., praying an injunction to restrain certain creditors of the estate, and of one of the distributees thereof, from proceeding to enforce their claims, and praying also for direction as to distribution of assets, and conduct of administration. Certain of the defendants demurred to the bill. On the hearing of the demurrer the court overruled it, but struck cross-bills which had been filed by defendants, on demurrer by complainants. The demurring defendants excepted. Prior to this ruling, certain interlocutory rulings had been made referring the case to a master, etc., and on exception error was assigned on this, and the striking of the cross bills, as well as the main ruling. All of the defendants were not served with the bill of exceptions. On argument in the supreme court, a motion was made to dismiss the bill of exceptions on the grounds stated in the first four divisions of the opinion, which was decided as therein set forth.

# F. H. MILLER, for plaintiffs in error.

W. W. MONTGOMERY; BARNES & CUMMING, for defendants.

SPEER, Justice.

I. This case comes before this court on a judgment overruling a demurrer to the bill of complainants. The writ of error brings that issue here properly, because, if the demurrer had been sustained and the case dismissed. there would have been an end to the controversy. each party has excepted to other rulings of the court interlocutory in their character, such as reference to the master and demurrer to answers in the nature of cross-bills by the defendants. These exceptions cannot be heard on this writ of error, because they can only be reviewed when the final hearing of the case has been had. See Code, §4250. The language of that section is—speaking of these interlocutory exceptions—"and should the case at its final termination be carried by writ of error to the supreme court, by either party, error may be assigned upon such bills of exceptions and a reversal and new trial may be allowed thereon, when it is manifest that such error or decision of the court has or may have affected the final result of the case."

So that it is too clear for argument, that these interlocutory exceptions cannot be heard until the final termination of the case in the court below. If either party has not filed the exceptions as interlocutory, but has embodied them in the bill of exceptions now brought here, he may still file them in the court below, and make them of record, so as to be brought up for review on the final termination of the cause, should that termination of it come to this court for review. (64 Ga., 740; Standford vs. Treadwell, present term.) Therefore, the only question to be now reviewed is the demurrer to the original bill.

2, 3, 4. A motion was made to dismiss this writ of error

on three grounds, first, that the defendants were not served. They need not be served because other defendants have brought this cause, and they need only to serve the complainants, especially when they demur to the bill for want of equity. Second, because the bill of exceptions was not certified within thirty days from that decision rendered, whereby alone the court could adjudicate the point, which it is claimed was when the court passed upon the injunction.

But, on the application for injunction at chambers, the sole question is the grant or refusal of that writ. No judgment overruling the demurrer was then rendered, and none could have been rendered (58 Ga., 184), on the mere application for injunction. Thirdly, because the exceptions come up by piecemeal. We have lopped off the pieces, and the only one left is as to overruling the demurrer to the original bill. We, therefore, overrule the motion to dismiss this writ of error, as to the question we now shall and can only review, and to that we now address ourselves.

5. Complainant below, as a foreign executor of his wife, Mary G. Harrison, who died in New Jersey, in conjunction with certain legatees under her will, filed their bill against various defendants, creditors of the testatrix, and also creditors of certain legatees under the will, in which he alleges that creditors by numerous suits, both by attachment and at common law, are levying upon certain property of the estate, seeking to subject the interest of said legatees in said property to their debts. It is alleged that Mary G. Harrison, the testatrix, formerly Jones, and her sister, Sarah F. Gardner, were tenants in common, by inheritance to a large amount of real estate in the city of Augusta; that on the marriage of said Sarah and Mary G., with their husbands, all their interest in said property was conveyed to trustees in said deeds named to their separate use, with certain powers, limitations, etc.; that soon after the marriage of Mary G., a partition of

said lands was had, between her and her sister. After said partition, Sarah, under power in the marriage settlement, sold to the trustees of Mary G., in consideration of two bonds of \$40,000.00 each and an annuity of five thousand dollars to R. H. Gardner and his wife, Sarah Gardner, to be paid to them during their joint lives and to the survivor, the entire interest held by them under the marriage settlement of Sarah Gardner. The object of the sale was, first, to secure said annuity to Gardner and wife, and, secondly, to create an indebtedness from the trust estate of Mary G. Harrison, for the benefit of those entitled to said trust estate of Mrs. Gardner in remainder. It is charged the annuity of \$5,000.00 was regularly paid to Gardner and wife jointly, to the death of Mrs. Gardner, in 1860, and since to R. H. Gardner. Mrs. Gardner died, leaving as her blood heirs the testatrix, then living, and her brother, Geo. N. Jones. Testatrix died in 1875 and the brother died in 1878.

Complainant is advised one of the two bonds of \$40,000.00, payable upon the death of Mr. Gardner, has, by the terms of Mrs. Gardner's marriage settlement, become the property of testatrix's estate, and has thus become extinguished, but the other bond is a valid claim against her estate, payable on the death of R. H. Gardner, and that the annuity of \$5,000.00 is a yearly subsisting claim against testatrix's estate during the life of R. H. Gardner.

The legatees, under the will of testatrix, are the Protestant Episcopal Church of the Diocese of Georgia, the complainant and his three sons; their several interests appear by the will exhibited.

Complainant alleges that, supposing the estate in his hands as executor was ample to meet its debts due Gardner and Jones, and desirous of providing for W. H. Harrison, Jr., who had arrived at age, he executed to him certain conveyances of portions of the real estate of testatrix as appears by deeds attached, and which was about in value what his share in said estate was after making al-

lowance for claims against the estate—except it was underderstood that the rents of the property so conveyed were to be reserved to aid in paying the annuity to Gardner. He alleges much of the real estate left is unimproved and unproductive and subject to annual taxes of \$3,000.00 or more, and that the whole income is not quite sufficient to pay the necessary expenses of the annuity, and if the property conveyed to Harrison, Jr., is withdrawn from the estate, the income of the remainder will be wholly insufficient to meet the charges upon the property. Harrison, Jr., has mortgaged the property conveyed to him to certain trustees to secure the payment of \$30,000.00 of bonds issued by him, which have become due, and foreclosure is threatened. He has likewise mortgaged certain portions of said property to Warner, trustee, to secure the payment of certain notes he (Harrison, Jr.,) indorsed for Hazleton & Harrison to the amount \$18,000,00, all of which are due and protested.

The Mechanics' and Traders' Bank have garnished complainant, individually as executor, on account of a debt due it by Harrison, Jr. Other parties have sued complainant individually and threaten to levy on his interest in the estate of testatrix. He cannot permit his interest or that of the property conveyed to W. H. Harrison, Jr., to be levied on and sold by attachment and general judgments until provision is first made for the creditors and other legatees of the estate.

Complainant charges that various judgments have been obtained by the individual creditors of complainant against him, and also against W. H. Harrison, Jr., and are being levied on their interest in said estate, the interest of complainant being a one-third undivided interest in fee and a life interest in the other two-thirds of all of said lands. Said property so levied on being part of the estate of his testatrix. Other suits now pending against him and W. H. Harrison, Jr., will soon go to judgment, and if levied upon the property of the estate (and there is none other

to levy upon) will greatly embarrass the administration of the estate.

Discovery is waived; a decree is sought for directions instructing him, in view of the conflicting claims of the defendants, how to administer the estate of testatrix; that defendants may establish their priorities and show to what extent they can legally subject the assets of said estate to the payment of their claims; that the rights of creditors and legatees may be protected, and also a general prayer for relief. A prayer for injunction against the defendant is also asked for. To this bill various exhibits referred to in the bill are attached.

The court on a hearing granted the injunction as prayed for. Certain of the attaching creditors thereafter filed their demurrer to said bill.

- (1.) For want of equity.
- (2.) Want of proper parties.
- (3.) Because there is an adequate remedy at law.
- (4.) From failure of complainant to attach certain papers to his bill referred to, in compliance with the 4th rule in equity.

The bill is filed by the executor, seeking the aid of a court of chancery to direct him as to the execution of the will of his testatrix, and determine in what manner he shall execute the same, with a view to protect the interest of those who have claims against the estate of his testatrix, not only as creditors but as legatees under her will, and at the same time to adjust the rights of that numerous class of creditors of two of those legatees whose interest as such in said estate they are seeking to subject to their debts.

In the case of *Miles & Co. vs. Peabody*, administrator, 64 Ga., 729, this court held: "Where questions of advancement to heirs at law of a deceased, and the amount due to each, and the claims of the creditors of the estate and one of the heirs by attachment and otherwise and their priorites, all had to be determined before an administra-

tor could move safely in disposing of the estate, a bill by him against the heirs and creditors for direction and distribution is not without equity."

From the allegations in this bill, it appears that this will was executed in Georgia; that subsequently the testatrix removed to New Jersey, and there died. That the probate of the will was had there and letters were granted there. That the executor has returned and resumed his domicile here, and with the whole estate of his testatrix in this state is seeking to execute his trust here. In the language of a former decision of this court, we might well say, this cause revolves around two centres, one that of the testatrix where creditors and legatees are contending for the estate as being preferred claimants, and the other are the creditors of W. H. Harrison, Sr., and W. H. Harrison, Jr., as legatees. To divide or administer this estate among these contesting claimants so as not to involve this executor in danger and loss, the interposition of chancery, we think, might well be invoked. To distribute both according to law, makes the task more difficult and necessitates the aid of equity on its general jurisdiction of all matters of trusts, as well as that which arises from a state of things which would multiply suits, and waste the estate in expenses and costs. This executor charges if these suits are allowed to proceed and the interest of these legatees are seized and sold, it will wholly disable him from paying this annuity due from the estate of his testatrix to R. H. Gardner of \$5,000.00 during his life, and the bond debt of \$40,000.00 maturing to the estate of Noble at the termination of the life estate of Gardner. These creditors have a prior and preferred claim to be secured from this estate prior to all others and equity should interfere to protect them.

It is claimed, however, that there are no proper parties to this bill, and this is the second ground of demurrer. In other words, this executor being a foreign executor, it is said, cannot maintain this suit.

· Section 2450 of the Code declares, "That these foreign executors shall be entitled to use all the processes and remedies prescribed by the laws of this state in the same manner as if qualified under the laws of this state." In construing this section of the Code, in 44 Ga., 38, this court ruled, "that when an exemplification of the probate of a will in another state is filed (as has been done in this case) in the clerk's office, under the provision of the 2414th section of the Code, properly authenticated according to the law of the state of the testator's domicile, it is sufficient to authorize the executors to sue in the courts of this state." There is nothing in the act of 16th December, 1878, to modify or change this provision of the Code as contended for by counsel for plaintiff in error as to these remedies. Under our view of the complications and embarrassments of this administration, we can see no adequate remedy at law to meet the varied issues, etc., that will arise in the administration of this estate: but a court of chancery, with its ample and comprehensive methods of relief, alone can embrace them and settle them under one general decree.

It is claimed that there were not all of the exhibits attached to complainant's bill as required by the fourth rule of equity. While this may be true, it is in the power of the court below to require this to be done on terms, and we presume this will be done in time, in the discretion of the chancellor.

But it is also insisted that as this bill is filed by a foreign executor, and the will was admitted to probate in New Jersey, where testatrix died, that the executor should have invoked the laws of New Jersey under the comity of states to have aided in the execution of this trust, and that the provisions of this will are to be construed by the laws of that state. While such might be the rule in the bequest of personal estate, we do not think it applicable to real estate within this state. In the case of Kerr vs. White, executor, 52 Ga., 362, it was held that where a will is executed and admitted to probate in Tennessee

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in conformity with the laws of Georgia, devising certain lands in this state to A B in trust for the testator's children, the trustee takes the title to the land under our law clothed with the trust for the beneficiaries, and the laws of Tennessee, prescribing upon what terms the trustee shall enter upon the execution of the trust, have no application. Touching devises in wills in foreign jurisdictions of lands situated in this state, the *lex fori* obtains and not the *lex loci*.

Judgment affirmed.

# BULLARD vs. JONES, administratrix, et al.

- 1. Though a deed may have been made in 1872, with bond to re-convey, to secure the payment of a usurious debt, yet if in june, 1873, the parties came together, and the debtors surrendered the land absolutely to the creditor in payment of the debt, it being agreed that the bond should be delivered up and canceled, the title became fixed in the creditor, and the debtors could not afterwards recover the land, though the bond may not have been in fact surrendered and canceled.
- 2. If the land was placed by the debtors in the hands of the creditor with the agreement that he was to sell it, pay himself, and then turn over the excess to the debtors, no time being specified within which this was to be done, and no agreement being made as to its use meanwhile, the creditor was bound to use such diligence and efforts to sell as good faith and fair dealing required.
- (a.) If he failed to sell without fault or negligence on his part, and received during the time of such holding any benefit resulting from the use and occupation of the land, he would be liable to account for the same. He would also be entitled to such allowances for legitimate expenses incurred in and about the performance of his obligation as were necessary to make the land available for use as well as to protect its ownership and possession.
- (b.) It being in controversy which of these hypotheses was true, if the creditor bargained the land to another for less than the amount of the debt, and the debtors knowing it made no objection, this was a circumstance which the jury might consider as tending to show that the debtors understood their debt to be extinguished.
- 3. Where the creditor bargained the place to another and a part of

the purchase price was paid, but subsequently the contract was not consummated, it was error to charge that the creditor was liable to the debtors both for rents and profits from the time he took possession and also for the amount received on the sale.

4. The verdict does not conform to the evidence in the case.

Title. Interest and Usury. Equity. Debtor and Creditor. Contracts. Before Judge PATE. Twiggs Superior Court. March Term, 1881.

Reported in the decision.

LANIER & ANDERSON; HILL & HARRIS; JNO. F. GLOVER, for plaintiff in error.

HALL & SON; DUNCAN & MILLER; J. D. JONES, for defendants.

CRAWFORD, Justice.

The defendants in error, Jones & Watson, being indebted to one Sutton a balance on purchase money for land, applied to Bullard, the plaintiff in error, for a loan with which to complete the payment due to Sutton. The loan was effected January 18, 1872, by Sutton's making Bullard a deed to the land to secure the note, and by his executing a bond for titles to Jones & Watson to make them a deed when the note was paid. The sum borrowed was \$1,500.00, the interest agreed upon 21 per cent. a month, making the note at maturity, December 25th, 1872, amount to \$2,000.00. Not being paid, in June, 1878, it was renewed and extended to December 25th, 1873, by adding in the accrued and accruing interest, which brought up the amount due at that time to \$2,631.58. The bond for titles was also renewed to correspond with the note. Jones & Watson failed to meet this note also at maturity, whereupon, soon thereafter, an agreement was entered into by the parties, which not being in writing, and not distinctly understood between them, causes this litigation.

Jones & Watson claim that, seeing the interest was eating up the land, they proposed to Bullard, as he had the title, to take the land, sell it, pay himself, and pay them the overplus, which he agreed to do.

On the other hand, Bullard says that the land was surrendered to him in payment of the note, and that he took possession as the absolute and unconditional owner.

He went into possession of the land in February, 1874, and having had it for four years, and rendering no account of any sale, Jones & Watson brought this suit, praying an account from him of the amount received from the sale, and rent of the land; the amount of usury; and a decree declaring the contract void for usury; that the deed be canceled, and that the land be decreed to be the property of Jones & Watson, after paying whatever sum may be due to Bullard.

The defendant denied all liabity to account to them for any thing; alleged that one of the lots of land had been levied on for the taxes of Jones & Watson, and also under an execution against Sutton; that he was at great trouble and expense in protecting the title; that he had sold the land to one Walker for \$3,000.00, one third of which was cash; failing to pay the other instalments, he had to sue him out of possession at an expense of \$100.00, all of which amounts are particularly set forth in his answer.

Upon the trial of the case the testimony of the parties themselves supported their respective theories of the contract. Other witnesses were introduced to testify as to the value of the land, for sale, its value for rent, and all matters of expense attending the use and occupation, as well as the expense of protecting the title, etc.

The jury returned a verdict finding Jones & Watson in debt to Bullard \$686.36 on their note, and that the same be paid by them within ninety days or the land should be sold for the payment of the same. This verdict was construed by the court to mean that when Jones & Watson

paid the aforesaid sum the title to the land should vest in them, and it was so decreed.

The defendant moved for a new trial on the usual statutory grounds, besides others based upon charges given and refused by the judge.

There is no view in which we can look at this verdict, under the facts as established at the trial, that would authorize it to stand under the law. There never was any legal title in the complainants to this land, nor did they ever have a perfect equity upon which they could claim it.

The deed, it is true, was made in January, 1872, and standing by itself, could never have been enforced except as an equitable mortgage, and that only to the extent of the amount due for principal and ten per cent. interest thereon. It is also true, that even though usurious, if the parties came together in June, 1873, when there was no usury law in force, and agreed unconditionally that the land was to be taken by Bullard in payment of his debt against Jones & Watson, he delivering up to them their note for \$2,631.58, and they delivering up to him his bond with the possession of the land, then Bullard would have had a good title to the land, although the Sutton deed was not taken up and a new one executed. McCaskill vs. Lathrop & Co., 63 Ga., o6. Nor would the title fail under such a contract if the land were surrendered, although the note and bond were not exchanged by reason of a mere inadvertance.

If, on the contrary, the parties did not thus agree, but Bullard agreed to take the land, sell it, pay himself and then turn over the excess to Jones & Watson, with no time specified within which it was to be done, and no agreement as to its use meanwhile, then in that case Bullard was bound to use such diligence and effort to sell as good faith and fair dealing required. But if he failed to sell without fault or negligence on his part, and received during such time any benefit resulting from the use and occupation of the land, he would be liable to account for

the same. Coupled with this liability, there existed a corresponding right to such allowances for all legitimate expenses incurred in and about the performance of his obligation, as were necessary to make the land available for use, as well as to protect its ownership and possession.

Should the facts upon a trial be found with the theory and claim of Bullard, that necessarily ends the case. But if, on the other hand, with the complainants, then, coming into a court of equity as they have, they are bound to do equity, and should be made to account for all sums legally due the defendant, whether for loans received, or for all proper allowances to which he may be entitled.

In January, 1872, conventional interest as high as 10 per cent. per annum was collectible by law; and in June, 1873, any rate of interest agreed upon in writing was collectible. If, therefore, in June, 1873, these parties came together and stipulated that the interest should be two per cent. a month, it was legal, and the courts were bound to enforce it at that rate until paid. Not only so, but if in consideration of the further extension of the note, it was also agreed that the excess of interest over 10 per cent. included in the note of January, 1872, should be paid as part of the consideration for forbearance to sue and for the indulgence given, then the parties would be liable therefor. To make such liability, the agreement should be express and not implied from the mere re-Taylor vs. Thomas, 61 Ga., 472. newal of the note.

Taking, then, these several principles as the law of the case, the court below erred in refusing to charge as requested in the 10th and 12th grounds of the motion for a new trial, which were:

(10.) "If you believe that the amount of Bullard's note, when he bargained to sell to Walker, was more than the price at which he agreed to sell to Walker, and Jones and Watson stood by and knew such bargain to sell was made, and offered no objection thereto and acquiesced therein, you may consider that as a circumstance showing that

they understood their agreement with Bullard under which he went into possession to be in extinguishment of the debt."

(12.) "If the jury believe from the evidence that the land in question was surrendered to Bullard by Jones and Watson in satisfaction of the debt, and that Bullard went into possession and held the same as his own in satisfaction and settlement of the debt in question, and that it was agreed that the said bond for titles should be delivered up and canceled, then I charge you that complainants cannot recover in this action, though there may have been usury in the original debt, and though said bond was not in fact surrendered up and canceled, and the jury will so find."

The court erred in charging as follows:

(15.) "Now in reference to the claim for rents and profits, I charge you that if you find there was this agreement to take the land and dispose of it and pay off the note, and the defendant has not done so, then I charge you that the complainants have the right to the rents and profits, and Bullard must account for the same from the time he took possession till now. You will see how much these rents are from the evidence before you. The complainants also have the right to have the amount received from Walker credited on said note."

To charge Bullard with the rents from the time he took the land up to the trial, and to charge him "also" with the amount received from Walker, would be inequitable and unjust.

Besides these errors of law, if the calculations made and submitted by the counsel for defendants in error, were those adopted by the jury, or approximated them, then the rents charged Bullard were \$200.00 a year higher than Watson, one of the complainants, swore that they were worth. Further, there was no allowance for the repairs, except to stand off the rent of 1875 against them, when that was one of the years the land was occupied by Walker,

Dixon vs. Mason

and the whole amount received from him had been already charged up against Bullard.

Again, even if the debt of Bullard were reduced to \$1,725.00, in June, 1873, which 10 per cent. on \$1,500.00 would make, the agreed rate of interest afterwards due thereon would exceed \$400.00 per annum—\$100.00 more than Watson swore that the land was worth for rent a year; hence it is not easy to see exactly how the debt was reduced to \$686.36 on any fair basis under the testimony.

Let the case be tried over in conformity to the principles herein set forth, and doubtless a fair and equitable verdict will be rendered.

Judgment reversed.

JACKSON, Chief Justice, concurring.

It seems that the principle ruled in Houser vs. The Fort Valley Bank, 57 Ga., 95, was extended in the case of Taylor vs. Themas, 61 Ga., 472, so as to embrace usurious and illegal past interest in a new contract made when there was no law against usury. If so, I yield to it until reviewed, preferring to stand on the rule laid down in the 57th Ga., limiting the new contract to future interest, and not permitting past usurious interest to be recovered on a new contract. My brother Speer also concurs in this view.

## DIXON vs. MASON.

- A judgment may be amended so as to conform to the verdict on which it is founded after execution has been issued, or even after it has been satisfied.
- 2. The judgment must be amended by an inspection of the record, including the verdict and pleadings; parol proof cannot furnish a ground of amendment not in the record. Especially is this the case after the lapse of years and the full execution of final process.

Judgments. Amendment. Practice in Superior Court.

#### Dixon vs. Mason.

Before Judge LAWSON. Wilkinson Superior Court. October Term, 1881.

Reported in the decision.

- J. W. LINDSEY, for plaintiff in error.
- F. CHAMBERS, for defendant.

JACKSON, Chief Justice.

This was a motion to amend a judgment entered on a verdict, so as to make the judgment accord with the verdict. The motion was denied, and the error assigned here is the denial of the motion to amend.

The facts are, that on appeal from the line marked by processioners the following verdict was returned: "We, the jury, establish the McCraney survey, commencing at the south corner and running a straight line to the north corner." Whereupon the following judgment was rendered: "Whereupon it is considered and adjudged that the verdict of the jury be enforced, and that the line surveyed by the surveyor, McCraney, be established as the true line dividing the lot, number 119, in the 3d district, Wilkinson county, in equal parts, between the plaintiff and defendant, and it is further ordered, that the costs of said proceeding be equally divided between the parties, and that the county surveyor proceed to run and mark a straight line in accordance with the order dividing said lot of land equally between the parties, and that the clerk issue execution for costs." etc.

The motion to amend is to the effect that the words "equal parts," and the words "in accordance with the order dividing said lot of land equally between the parties," be stricken from the judgment, and that these words be added after the words "straight line," to-wit, "commencing at the south corner fixed by McCraney, to the north corner fixed by him."

#### Dixon vs. Mason.

- I. There can be no doubt that a judgment may be amended so as to conform to the verdict after execution has issued. Code, §3494. And even after the execution has been returned satisfied. I Kelly, 469.
- 2. But the rule has not been extended beyond allowing it to be amended so as to conform to the verdict, and only the record will be inspected to see whether it does or does not conform, that is to say the courts should not look be yond the verdict and the pleadings. 24 Ga., 429. Parol proof will not do to amend by, especially after the lapse of much time, is the ruling in the same case, and Judge Lumpkin says, in delivering the opinion therein, that "it is going very far to allow a verdict to be amended by the declaration; and the judgment by both writ and verdict. Beyond this the courts should refuse to go, particularly after the judgment has been satisfied and much time has elapsed."

What is the McCraney line? Did it divide the lot into equal parts? Did it fix a north corner, so that running from the south corner to it the lot would not be equally divided? We cannot tell from the verdict and the pleadings. The presumption is that it did divide the lot equally or the judge would not have so construed the verdict and so entered the judgment. Even if we were at liberty under the preceding rulings of this court to search the evidence, there is absolutely nothing going to show where the McCraney survey fixed the line.

The court below "inspected the record," as the record shows, and decided from that inspection that there was not sufficient in it to satisfy the mind that the judgment did not carry out the true intent and meaning of the verdict. We have also inspected it, and find nothing to show that it did not conform to the verdict in its true intent under the pleadings. We gather from them, the pleadings and plats accompanying them, that the contest was between a straight and a crooked line, and that the deeds required an equal division of the lot. So that construing

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the verdict in the light of the declaration or pleadings and the judgment in the light of "both writ and verdict" or pleadings, as Judge Lumpkin said in the case in the 24th Ga., we see no error in the denial of the motion to amend the judgment, especially as it has been fully executed, and an application for mandamus to the county surveyor to survey the line claimed by plaintiff in error, in which both these parties appeared has been adjudicated and denied, after a hearing thereon, and on what ground does not appear,—for aught we know on the merits, and most probably so; and more especially because now to amend the judgment would be prejudical to the rights of the defendant in error after the lapse of some years, and when no exception was taken to the judgment when rendered, or in thirty days thereafter.

We think that the case should be clearly made out from the record that the judgment does not follow and carry out the true construction of the verdict put on it by the court which rendered it, and affirmed by the same court on review by a succeeding judge, before this court would feel justified in interfering by a reversal. It is always the duty of the plaintiff in error to make the error plainly appear, and it is not made so to appear in this record. We do not know that the judgment does not carry out the verdict; and if it does carry it out, we would do great injustice to the defendant in error to alter that judgment; for it would not be to grant a new trial but to close the case against him forever.

Judgment affirmed.

## SANDEFORD vs. LEWIS et al.

- There is no such thing as a non-suit in equity practice; but if the proof introduced by the complainant will not warrant a recovery, the chancellor may dismiss the case.
- (a.) If a case in equity has been properly dismissed for want of sufficient proof to sustain a recovery, this court will not reverse the judgment because it was called a non-suit.
- 2. He who seeks equitable relief must come with clean hands and without laches.
- (a.) A tenant who had leased property set apart as a homestead for a woman and her children, bought a fs. fa. outstanding for a balance of purchase money for the land and certain other fs. fas., some of them against the deceased husband; under the first fs. fa. he caused the land to be levied on and sold, and he became the purchaser; he retained enough to pay all the claims in his hand, and the balance paid to the sheriff was distributed under a money rule brought by the widow. Subsequently the purchaser filed a bill to recover the amount so distributed on the ground that an amount was due to him for improvements made on the homestead before the sale:

Held, that under these facts no case for equitable relief was made out, and the cause was properly dismissed.

Equity. Practice in Superior Court. Landlord and Tenant. Debtor and Creditor. Before Judge SNEAD. Richmond Superior Court. October Term, 1881.

Reported in the decision.

R. O. LOVETT; SALEM DUTCHER, for plaintiff in error.

HABERSHAM & CAPERS; M. P. CARROLL; J. D. ASH-TON, for defendants.

JACKSON, Chief Justice.

A bill was filed by the complainant against the defendants to recover money which had been paid by the complainant for a tract of land purchased by him at sheriff's

ale, and after the purchase money paid by him had been listributed under a money rule against the sheriff by reguar judgment of the superior court. The complainant had eased the land from the defendant, Grace Lewis, who controlled it as a homestead regularly set apart by the court of ordinary for herself and minor children, and the consideration of the loan, which was to continue five years, was the completion of the dwelling-house by the lessee, who is the complainant. During the continuance of this ease, and when the building had been nearly completed, the complainant ascertained that a judgment lien was on premises for some one hundred and fifty dollars, the the balance of purchase money. Thereupon, without notice or complaint to his landlord, and before any levy or threat to levy the execution by the plaintiff in execution, the complainant bought the execution for balance of purchase money, had the land levied on and sold by the sheriff, and bought it himself at the price of \$825.00. From this price which the land brought, he deducted the face of the purchase money execution, and two or three other executions, and paid over the balance, some \$520.00, to the sheriff. He gave no notice to the sheriff to retain this fund or any part of it, but without any claim at all to it paid it over to the sheriff, satisfied that the sheriff allowed him to retain the value of the purchase money fi. fa., a fi. fa. against the deceased husband of defendant, Grace Lewis, obtained prior to the creation of the homestead estate, and other fi. fas. which had no lien on the homestead, not having been issued on judgments obtained by suit against that estate, so as to subject it according to law to their judgment. The fund of \$520.00 was distributed, under a money rule brought by Grace Lewis against the sheriff, to Grace, her counsel, and another creditor who became a party to the rule, by consent of all concerned, a regular valid judgment of the court so distributing it having been rendered, ordering the sheriff so to pay it out. The other creditor got his

part in hand, the lawyers got theirs, and not having paid Grace over her share, held it for her. The bill was brought to recover this money from Grace, her counsel, and the other distributees of the fund, as due to complainant for improvements made on the homestead, estimated at \$625.00.

On the hearing, the court, the bill and facts proved having made substantially the foregoing case, non-suited the complainant and he excepted.

1. No such thing as a non-suit is known in equity practice; but if there be no equity in the bill and facts made by the proof, on the hearing the chancellor may dismiss the case for want of equity made apparent by the proof or want of sufficient proof to sustain the proceeding and justify a recovery in equity.

And though the action or judgment of dismissal be called a non-suit, and be thus misnamed, yet a reviewing court in an equity cause, looking, as equity always does, to substance and not shadows, to the thing done and not the misnomer of that thing, will affirm the deed without legitimizing the name. 62 Ga., 718-725. Wilson vs. Hall et al., last term.

The question therefore is, do the facts proved entitle the complainant to relief in equity?

He that seeks relief in the court where equity reigns, must come with clean hands and without unfair conduct himself. He must knock at her doors too without delay and *laches*. He must have been guilty of no duplicity, but must have acted toward those whom he would arraign at her bar so justly that with an open face and a clean conscience he may demand justice from them.

Do the facts narrated above, and recited as favorably for the complainant as this record will permit, show such clean hands, clear conscience and fair conduct as commend his suit to the keen eye of a court of chancery?

Let us see. He was in the possession of the premises leased. Nobody was threatening to disturb that possession. No levy was made on his leasehold. No eviction

nad taken place. There was a judgment for balance of ourchase money belonging to another. The plaintiff in execution had not moved at all towards enforcing it on the and which it covered. Hearing of its existence, straightway he himself hastens, without saying a word to his landady, to buy the execution. When he has secured it, he does not then say aught to her about its purchase; but levies it himself, through the sheriff, on the land. Still she is left in ignorance. The land is advertised and sold, and he himself buys it at the sale, his landlady still ignorant of all his conduct; and not until the sheriff's deed is in his pocket, does he hint to her that he has become the absolute owner of that trust estate which he occupied as her tenant, and thereby agreed to attorn to no other but herself. Not only so, but he buys up various smaller executions against, not the homestead which he had leased, but some against the decedent, and others which did not bind the estate he had leased, the trust estate of these minors. So that, armed with this balance of purchase money f. fa. and these other fi. fas., he proceeds to war upon the estate he has leased, and with these, and the claim for completing the dwelling, he proposes to the court of equity to permit him to recover the entire estate he leased for five years, and thus to get the fee to the land for a trifle more than he agreed to give for its lease for five years.

All this he proposes to do after a judgment of a court of law distributing the money, and when, to accomplish his purpose, equity must do what she always does with great reluctance, and only in a clear and strong case, and that is, annul and set aside a regular judgment at law.

We have passed by the doubt that the fi. fa. was for the balance of purchase money, the facts that no exhibits were made to a bill which demanded the most explicit statement of facts and exhibits of record and deeds and leases, that no clear record proof was had of the judgment sought to be set aside, that no explanation is offered

of the strange conduct of paying over money to the sheriff as a balance due to other people after all his own claims, legal and illegal, had been retained, and of now seeking to recover it back. We pass by all these and other circumstances which might be glanced at, and rest the case on the broad rule in equity, as broad and comprehensive as equity itself, that no man who has destroyed what he was trusted to preserve, and absorbed for himself, for his own enrichment, the property of minors temporarily entrusted to him on terms, can be permitted to enter a court of equity and obtain relief over the bar of a judgment at law by her aid.

Judgment affirmed.

## SIMS vs. THE STATE OF GEORGIA.

- 1. Where a ground of error alleged in the motion for a new trial was that the testimony of a named witness was admitted to impeach one of movant's witnesses, without stating which one—it appearing that the same witness was used for the purpose of impeaching several witnesses of the movant, this court will not grant a new trial on that ground.
- 2. Where a witness introduced to impeach another stated that he had known the general character of the latter the year previous, that it was bad, and from it he would not believe such witness on oath; but that he did not know the general character of the impeached witness during the current year, nor that there had been any change in the public estimation, but from his private knowledge of the witness he believed there had lately been reformation in him, such answers were competent to go to the jury under proper instructions of the court.
- (a.) The charge not being set out, will be presumed to be right.

Criminal Law. Evidence. Practice in Supreme Court. Before Judge HARRIS. Coweta Superior Court September Term, 1881.

Isham Sims was indicted for simple larceny, and on the trial was convicted. He moved for a new trial, on the following among other grounds:

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- (1.) Because the verdict was contrary to the law and he evidence.
- (2.) Because the court erred in permitting one Pinson, a witness for the state, called to impeach a witness for the defence, to give his statement as to what the character of said witness had been in the community in which he lived. Witness said he knew what public opinion was last year, and the court permitted witness to say that he did not know whether the public opinion had changed, and that he would not believe said witness for the defence on his bath; said Pinson stating at the same time that the witness had reformed, in his opinion, and from what he personally knew of said witness now he would believe him on oath, counsel for the defence objecting to the impeaching testimony unless witness would swear that he then knew the general character of said witness.

[The ruling excepted to in this ground of the motion was based upon the following questions and answers during the examination of Pinson: Q. Do you know Mose Sims? A. Yes, sir; I know Mose. know his general character? Is his character good or bad? A. It has been heretofore very bad. Q. Is it bad now? A. As far as this year is concerned, I know nothing against Mose. Q. What is his character? A. I will have to say that it is bad yet, for I don't know that it is good. As I say, I have not known any thing against Mose Sims this year. Q. From that character would you believe him on his oath? A. I would not believe Mose. Q. Do you know his general character now? A. Yes, sir; I think I do. (The court instructed the witness to answer directly whether he knew the general character of Mose.) I do not know hardly how to answer that question. I have known Mose all of his life from a boy. Q. What is his repution? A. He has the reputation of being a notorious gambler, and I would not believe any gambler. Q. The question is do you know his character -what other people say about it-how he stands? A. I

don't think I would believe him. Q. The question is do you know by what estimate he is held by the community -by the people? A. Well, sir, I do not know whether I could say that I would impeach Mose's testimony or not. I know a good deal against Mose; but he has been a right good boy for the last year or two. I reckon may be I I could believe Mose. I might do it. (Counsel here instructed the witness as to the meaning of general character, and then asked what people thought about Mose in the neighborhood in which he lived, either now or in the last four or five years.) A. Well, sir, as I said before, heretofore I would not believe Mose on his oath. O. I want to know if you know what his general character was in the neighborhood last year, and the year before, and the year before that? A. It was bad, sir. O. Do you know that that general character, as the people regarded him, has ever been changed-what the people think of him? A. Mr. Brewster, I could not answer that question. Q. The point I am after is, do you know that the people have changed about it? A. No, sir, I do not know. O. Now, Mr. Pinson, from your knowledge of his general character, is it good or bad? A. Well, sir, I would say it is bad. I will explain it. Mose Sims has been for the last three or four years a kind of loose negro over the country, that went sorter from pillar to post. He never would stay at one place long. His general character heretofore has been that of a gambler, for he admitted to me once that this Lewis Sims won his hat and boots: but I think there has been a reformation in Mose Sims, and he has been for the last year considerably changed; but I think that as far as what the people generally believe, his character is bad yet, but from my own belief, he has changed a little. O. From the general character would you believe him on oath? A. That is a mighty hard question to answer. Q. I speak now as if you had no knowledge of him in the world yourself. A. In that case, I would not.

On cross-examination the witness stated that from his personal knowledge of Mose Sims he believed the latter had reformed a little this year, and his character was better. The following colloquy also took place on cross-examination: Q. I understood you to testify that Mose Sims character was bad. A. No sir; I didn't say it was bad. I said heretofore it had been bad. Q. Are you acquainted with the general character of Mose Sims; are you now acquainted with it? A. No, sir; I am not. I have only my individual opinion about it as to his general character. What other people think about it, I could say it was bad, and I don't know that people have ever changed about it. I have changed on Mose Sims, mind.]

The motion was overruled, and the defendant excepted.

- P. F. SMITH, by HARRISON & PEEPLES, for plaintiff in error.
  - H. M. REID, solicitor general, for the state.

JACKSON, Chief Justice.

- 1. The defendant was tried and convicted of simple larceny. The theft charged is cattle stealing. If the witnesses for the state were believed by the jury the evidence is sufficient to support the verdict. Their credibility is for the jury. There was no error, therefore, in overruling the motion for a new trial on the ground that the verdict is contrary to the evidence and without evidence to support it.
- 2. Nor do we see that the court erred in admitting the impeaching testimony of the witness, Pinson. In the motion for a new trial, the objection is to his testimony as to one witness, but that one is not named, and several were impeached by Pinson. But even if the ground was clearly made, and the witness of the defendant alluded to be that one, or those even in respect to whose character the impeaching testimony is weakest, it ought to have

#### Hall vs. Matthews et al.

gone to the jury. Where the witness answers, it is a hard question, and to the effect that he might believe him but hardly would, the testimony should be weighed by them. It is general character that is the foundation, and if that has been bad but is a little better for a year, and the witness knows it from what it is generally among the people, whether a gambling or other illegal and immoral character, the witness may say whether or not he would believe him, and how much or to what extent he would credit him, and all he says may go to the jury and be weighed by them.

The charge of the court is not in the record, but it is not excepted to, and by presumption is right. Therefore, in regard to impeachment, the law was given correctly in charge, and, therefore, the jury were told what was necessary to be proved in order to impeach a witness, and under a proper charge defendant could not have been hurt.

It is enough, however, to say in this case and on this point, that the motion for a new trial does not specify which witness impeached by Pinson is alluded to, and the point cannot therefore be specifically ruled. On a general view of all of it, we fail to see such error, if indeed any at all, as would authorize us to grant a new trial.

The other grounds for a new trial were abandoned here. Judgment affirmed.

# HALL vs. MATTHEWS et al.

- I. Where a homestead was taken by a man as head of a family including not only his wife but also a minor female grandchild who lived with him and was dependent on him, the death of the wife did not terminate the homestead estate, but it continued so long as the minor grandchild remained so dependent.
- (a.) A deed by the head of a family as an individual, purporting to convey land covered by a homestead, carried no title to the purchaser; nor could a recovery against the grantee as an individual be had thereon; pending the homestead estate to eject the head of the family would destroy the full enjoyment of the homestead by the members thereof.

### Hall vs. Matthews et al.

The making of a deed to homestead property by the head of a family as an individual, did not estop him from resisting, in his representative character on behalf of the beneficiaries of the homestead, an ejectment suit founded on such deed.

Homestead. Title. Ejectment. Estoppel. Before udge WILLIS. Talbot Superior Court. September Cerm, 1881.

Little *et al.* brought complaint for land against Hall. Their title rested on a deed made by Hall and his wife to hem in March, 1878.

Defendant insisted that the deed conveyed no title, and was a mere security for a debt. He offered an equitable clea alleging these facts, and praying that the land be sold, the debt paid, and the balance of proceeds paid to him. The court struck the plea. Defendant then put in evidence the records of the court of ordinary, showing that Hall had applied in 1873 for a homestead. The application stated that he was "the head of a family; that his family consists of himself, his wife, Nancy Hall, and a grandchild about five years old, and several colored persons he has employed to work on his farm for the present year." Upon this application, the land in controversy was set apart as a homestead, and so remained at the time the deed was made to plaintiff.

The grandchild was a girl, whose father had deserted his family, and who was and had been nearly all her life dependent on her grandfather. It was admitted that at the time of making the deed, defendant's wife, Nancy Hall, was insane. She died shortly after delivery of deed to plaintiffs.

The court instructed the jury that upon the death of Mrs. Hall the property reverted to Hall, and that although the deed made to plaintiffs was not good when made, yet upon the death of Mrs. Hall and the reversion as above stated taking place, it enured to the benefit of plaintiffs.

#### Hall vs. Matthews et al.

The jury found for the plaintiffs. Defendant moved for a new trial on the following among other grounds:

- (1.) Because the ruling just above stated was error.
- (2.) Because the court erred in sustaining the demurrer to the special plea of defendant.
- (3.) Because the verdict was contrary to law and the revidence.

The motion was overruled, and defendant excepted.

- E. H. WORRILL & SON; MARION BETHUNE; J. H. LUMPKIN, for plaintiff in erro
- J. M. MATHEWS; SMITH & LITTLE; M. H. BLAND-FORD, for defendants.

JACKSON, Chief Justice.

1. We think that the court erred in ruling that the homestead estate of the defendant ended upon the death of his wife. The grandchild dependent on him and raised by him from a babe, on the death of his daughter, is only thirteen years old now, and a beneficiary of the homestead as well as his wife; and while she lived, certainly as long as her minority and dependence upon him continued, the homestead estate continued. The title to it did not pass out of him as the head of the family, and no recovery can be had against him individually; because the effect of his ejection from the land would be to destroy the homestead of the infant and dependent granddaughter. Her father was in Texas, and dead to her. 63 Ga., 22; 61 Ib., 154: 60 Ib., 650; 59 Ib., 330, 629; 56 Ib., 390; 41 Ib., 153.

This view of the case will control it, and makes it unnecessary to consider the error assigned on striking the plea.

2. The fact that Hall in his individual capacity signed the deed to the plaintiffs did not estop him from defending the title in his character as head of a family on behalf of the beneficiaries of the homestead. To so hold, would

## Overby as. Hart.

be practically to destroy the homestead, and to uphold the bare right thereto for the benefit of the minor, and at the same time to prevent its protection through the usual and natural channel, the head of the family.

Judgment reversed.

## OVERBY vs. HART.

- A levy on real estate undisposed of is not prima facie evidence of satisfaction of the ft. fa., as is the case with a levy on personalty.
- (a.) That a f. fa. has been levied on land, a claim interposed and dismissed, and the f. fa. ordered to proceed, will not prevent a levy on other realty or require the fi. fa. to proceed on the original levy first.
- A chancellor has power at chambers to grant leave to a trustee for minors to sell realty held by him for them, notice being given and they appearing by guardian ad litem.
- (a.) Where a deed from a trustee stated in the body thereof the representative character in which he was acting, and the order authorizing the sale, it did not matter that he signed his individual name to such deed, affixing his seal, but not adding his representative character.
- Where an execution was against four defendants, an entry of levy which failed to state on whose property it was made was not sufficient.
- 4. A deed not being admissible in evidence, testimony purely ancillary to it would likewise be inadmissible.

Levy and Sale. Executions. Trusts. Title. Evidence. Before Judge CRISP. Stewart Superior Court. October Term, 1881.

A fi. fa. in favor of Hart against Brown, based on a judgment rendered in 1869, was levied on a certain lot which was claimed by Overby. On the trial, plaintiff in fi. fa. offered to put the execution in evidence. On it was an entry of levy on a lot in Terrell county, and an order dismissing a claim which had been filed thereto and directing the fi. fa. to proceed. Claimant in the present

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case objected to the introduction of the fi. fa. because there was no disposition of the former levy shown. The objection was overruled.

Plaintiff also showed possession in one Snelling and his son up to 1865, then in one Byrd till 1868, then in Brown for three years. He then offered in evidence a petition by Byrd as trustee for his minor children (naming them) to sell the lot. On this petition a guardian ad litem was appointed (not naming the minors separately, but as the minors of John C. Byrd). Service was acknowledged, etc., and an order allowing a private sale was granted in vacation. Claimant objected to this order because it was granted at chambers, and because the names of the minors were not given except in the petition. The objection was overruled.

Plaintiff then offered in evidence a deed reciting that it was made by Byrd as trustee for his children under the order just above stated, and conveying the property to Brown, in 1866. It was signed "J. C. Byrd," without mention of the trusteeship. Claimant objected to this because it was not signed as trustee. The objection was overruled.

Plaintiff also introduced a deed from Brown to the claimant in 1872.

Claimant relied on a sheriff's deed to the land conveying it as the property of John C. Byrd, made in 1874. The record of the suit the fi. fa. and the entry of levy, on which this deed was based, were offered in evidence. The fi. fa. was against four defendants. The levy did not state as whose property the land was seized. Plaintiff objected to this evidence on that ground, and it was rejected.

Claimant also offered certain interrogatories, which the court certifies were offered solely in support of the sheriff's deed, and were accordingly rejected with it.

The jury found the property subject. Claimant moved for a new trial, assigning error on each of the rulings stated

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above. The motion was overruled, and the claimant excepted.

- J. L. WIMBERLY; R. F. WATTS; E. H. BEALL; DU-PONT GUERRY, for plaintiff in error.
  - T. H. PICKETT; W. A. LITTLE, for defendant.

JACKSON, Chief Justice.

1. On the trial of this claim case, it was objected by claimant that a levy on another piece of land was not disposed of, and that therefore this second levy on other land and the fi. fa. on which it appeared should be rejected as evidence for plaintiff. The land first levied on had been claimed and the claim withdrawn, and the fi. fa. ordered to proceed, and it is argued that it must proceed on the first levy first.

We cannot see why. The first levy being on land, was no satisfaction of the judgment, as it might have been on personal property, and this takes the point here out of section 3657 of the Code. 6 Ga., 414; 39 Ib., 347.

- 2. The chancellor at chambers had power to order the sale of the property of the minors. They had notice and appeared by guardian ad litem. Code, §2327. There was no error, therefore, in admitting the order to the trustee to sell and the deed thereunder. It matters not that the deed was not signed "as trustee." The body of it sets out the order to sell and the character in which the deed was executed by the trustee who signed his own name thereto with seal affixed.
- 3. The claimant introduced or tendered a sheriff's deed to him with fi. fa. and levy. The execution was against four defendants, and the levy did not state whose property it was. Whereupon it was ruled out. The point is decided in 53 Ga., 189. That case cites Code, §3640, and the reasoning is conclusive on the section as covering that and hence this case. Besides, this court, in 11 Ga., 427,

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adopts the rule in 4 Wheaton, 503, and makes the purchaser bound to look to the judgment, the levy and deed, and at sheriff's sales requiring him to notice only these. Caveat emplor is not to be applied to him in any other conduct of the officer or other authority to sell and convey.

4. The interrogatories ruled out were only offered, as certified by the judge below, as ancillary to the deed of the sheriff. That being ruled out, they fell under the same blow.

Judgment affirmed.

# SWATTS et al. vs. SPENCE, administrator.

- Since the act of 1881, if the certificate of the presiding judge to the bill of exceptions is not dated, it will be presumed to have been made on the day of the acknowledgement of service by counselfor defendant in error.
- 2. Where a bill was filed by an administrator to marshal assets of an estate, and one of the creditors excepted to the decision thereon, the failure to join the other creditors as co-plaintiffs in error could be cured by amendment instanter and without notice.
- 3. Though an amendment should be made under leave of the courtyet where a bill was filed praying injunction, an amendment sworn to and filed before the hearing, a temporary injunction granted, and the case tried at a subsequent term without objection to the amendment, the absence of an order allowing it will not cause a new trial-
- 4. Entries made by the clerk on the execution docket of the superior court, in the presence of the plaintiff in the ft. fa. and under his order, were admissible on an issue as to the payment or non-payment of such ft. fa.
- 5. Where it was sought to settle a f. fa. by conveying to the plaintiff therein certain land, and by mistake a different lot than that agreed upon was described in the deed, in order to correct the mistake at the instance of the grantor or his administrator, equity would require a conveyance of the proper lot be made or the equivalent thereof.
- 6. If the lot actually conveyed under the mistaken deed (of equal value with that intended) was sold under fi.fa. against the grantee

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and the proceeds were applied to the payment of his debts, he cannot complain of the mistake.

(a.) The charge, the verdict and the decree in this case were right as to the plaintiff in error.

Amendments. Equity. Evidence. Deeds. Before MASTON O'NEAL, Esq., Judge pro hac vice. Mitchell Superior Court. November Term, 1881.

Spence, administrator of McElvain, deceased, filed his bill against Bradford et al. It alleged, in brief, that in 1874 his decedent was discharged in bankruptcy, and died in 1877, when complainant became his administrator; that defendants held various claims which they were proceeding to enforce against the estate, but which complainant believed had been discharged in the bankrupt court; that if they were proper claims the estate would be insolvent, otherwise it would be solvent. To avoid multiplicity of suits, this bill was filed praying that the assets be marshaled, the priorities of the various claims be settled, and that in the meantime the defendants be enjoined from pressing their claims. Leave was asked to make other like creditors parties when discovered.

Before the hearing of the application for injunction, an amendment was attached to the bill making Swatts a party and alleging, in brief, as follows: In 1871 Swatts held a fi. fa. against the decedent. It was agreed between them that the decedent (then in life) should convey a certain lot in the town of Camilla to Swatts in payment of the fi. fa., and it was marked settled on the execution docket. In drawing up the deed, however, through the fault of Swatts the lot was misdescribed, so that it in fact described a lot already sold by McElvain. The lot agreed upon, and intended to be conveyed, is still held by complainant, and he offers to make the proper and necessary conveyances; but Swatts refuses to receive it, and is proceeding to enforce the fi. fa. Discovery was waived. The prayer was for injunction and relief.

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No objection was made to this amendment, and answers were filed. Swatts' answer consisted mainly of general denials of the allegations of the bills, and prayers for strict proof thereof.

The testimony showed the conveyance of lot number 4 in block H. in the town of Camilla, first to one Byrd, and afterwards to Swatts, in settlement of the fi. fa. held by him. There was also testimony indicating that the conveyance to Swatts was intended to cover lot number 5 instead of number 4, that the conveyance of number 4 was a clerical error, and that the two were of about equal value. One witness stated that Byrd went into possession of number 4 and nobody took possession of number 5, but that the latter had since been sold under a fi. fa. against Swatts.

The jury found that the administrator should execute to Swatts a deed to lot number 5, and the court decreed accordingly, and that the fi. fa. be held to be settled. Swatts moved for a new trial on the following among other grounds:

- (1.) Because the verdict was contrary to law and evidence.
- (2.) Because the court erred in holding the amendment to the bill sufficient, there being no order allowing it and no service on any of the defendants, it appearing that the amendment was attached to the bill at the term the application for injunction was heard and before the hearing and that no one objected.
- (3.) Because the court erred in admitting in evidence the entries made by the clerk of the superior court on the execution docket in relation to the Swatts f. fa. [The clerk testified that he made the entry of settlement in the presence and by the authority of Swatts.]
- (4.) Because the charge of the judge was contrary to the law in the case in this: The issue being one of fact—payment or non-payment of defendant's fi. fa—it was outside of the case to instruct the jury that they might

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decree lot number 5 in block H., or any other lot than number 4, in satisfaction of defendant's fi. fa.

The motion was overruled and Swatts excepted.

The certificate of the judge to the bill of exceptions was not dated. Service was acknowledged on behalf of Spence, administrator, on December 10th, 1881. In the supreme court a motion was made to dismiss the writ of error because the other defendants to the bill besides Swatts were not made parties or served with the bill of exceptions, and because it did not appear when the bill of exceptions was certified. The motion was overruled, the court announcing the principles stated in the first and second divisions of the decision.

W. E. SMITH; A. L. HAWES, for plaintiff in error.

D. H. POPE, for defendant.

JACKSON, Chief Justice.

A motion was made to dismiss the writ of error on two grounds, first, that the acknowledgment of service and the filing of the bill of exceptions in the office of the clerk of the superior court were not in time, and, secondly, that the other defendants to the bill, it being to marshal assets and in which all were interested, were not served.

- 1. There is no date to the certificate of the judge, and it will be presumed, under the act of 1881, to have been made on the day of acknowledgment of service, which is the 10th of December, 1881, and was filed in the clerk's office on the 17th, which is in time.
- 2. Under the ruling in 62 Ga., 135, the other defendants to the bill need not have notice, but may, by amendment, be made co-plaintiffs; therefore the writ of error will not be dismissed, but the amendment will be allowed, and the co-defendants be made co-plaintiffs in this bill of exceptions.
  - 3. On the denial of the motion for a new trial we see



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no substantial error. The amendment to the bill, though not made by order or leave of the court, but before the injunction was granted, and not objected to on the application therefor, is no ground sufficient to set aside the verdict. No motion was made to continue, nor was defendant to the bill hurt thereby otherwise.

- 4. The entries on the execution docket by the clerk, made in presence of defendant and by his order, were admitted properly to go to the jury with the oral evidence thereon.
- 5. The question before the jury was whether the execution of plaintiff against decedent had been satisfied by the land sold him by decedent, and that turned on the other question whether he got or could get the lot actually sold, though another was conveyed in the deed to him, which the bill alleged was inserted in the deed by mistake. To correct the mistake, equity will require that the other party be put where he should have been put by the deed when reformed.

Therefore there was no error in the charge that the jury might find that the administrator should make a deed to number 5, or the equivalent thereof, if they should find that the conveyance to number 4 was inserted by mistake. It was equity, favorable too to the defendant below, the plaintiff in error here, and to which he could not object.

6. The evidence is sufficient to show clearly that the wrong lot was inserted in the deed, and that it should be reformed if equity could thereby at the same time be done to the other party. The decree requires that to be done by the administrator making him a deed to the other lot, proved to be of equal value, and if that has been already sold as his property by the sheriff, and applied to his debts—judgments against him—it has already gone to his benefit, and he cannot complain.

The charge of the judge pro hac vice gives the law of the case and the equities between the party complaining

here and the administrator clearly and accurately, the verdict of the jury is sustained by the evidence, and the decree thereon, so far as this plaintiff in error is concerned, follows it, and the judgment overruling the motion for a new trial must be affirmed.

Judgment affirmed.

# FEATHERSTON et al. vs. RICHARDSON, administrator.

- A deed contained the following provisions: " Now the further consideration (after the formal consideration of \$1.00) of this deed is that the said Featherston (the grantee) is to pay off and discharge said mortgages (previously described), he contracting to be liable for the payment of the same only so far as the proceeds of the land will go towards their payment, in no case assuming any individual liability except to faithfully discharge his duty in managing or disposing of the land so as to make it or the proceeds thereof, if possible, pay off and discharge said mortgages, and to take the trouble and vexation of managing and disposing of the same off the hands of said Richardson (the grantor); and whenever said F. shall in any way pay off or satisfy said mortgages, then all of said lots and parts of lots of land shall belong absolutely to him, discharged from all claims and incumbrances whatever except those hereinafter mentioned and specified," (the mortgages and a right of homestead in the land) which were "to hold in abeyance and to prevent going into full effect the absolute right of G. W. Featherston:"
- Held, that the deed conveyed the title in trust for the purpose of paying off the mortgages, and with the vesting of an absolute title conditioned upon the grantee's performance thereof; and on entire failure so to do, a bill would lie to set aside the deed or to compel the execution of the trust.
- (a.) The case is strengthened by allegations of application of the property by the grantee to his personal use, collusion with his wife, by having mortgages transferred to her, to obtain the property without performing the condition, and the like.
- (b.) The grantor having died, his legal representative could maintain such a bill, and obtain full relief.

Deeds. Trusts. Title. Equity. Before Judge UN-DERWOOD. Polk County. At Chambers. October 10th, 1881.

E. H. Richardson, Jr., administrator, filed his bill against G. W. Featherston and his wife, alleging as follows: E. H. Richardson, Sr., the father of complainant, died on May 23d, 1880, intestate, possessed of a farm in Polk county, containing 110 acres of land. On April 4th, 1881, com plainant was appointed administrator of intestate. On entering upon his duties as such administrator, he found Featherston in possession of the said farm, claiming to hold under the following deed from E. H. Richardson, Sr.:

"GEORGIA-Polk county.

This indenture, made and entered into this 10th day of April, 1876, between E. H. Richardson, Sr., of the state and county aforesaid, and G. W. Featherston of the same place, witnesseth that for and in consideration of the sum of ten dollars to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for the further considerations and with the limitations hereinafter mentioned and specified, the said E. H. Richardson, Sr., has this day bargained and sold, granted and conveyed, and by these presents does bargain and sell, grant and convey to the said Giles W. Featherston, his heirs and assigns, the following lots and parts of lots," etc., [describing the property and continuing as follows:] "Whereas, there are incumbrances in the shape of mortgages on all the lots of land conveyed by this deed, given to secure the payment of notes given by the said E. H. Richardson, Sr., to several parties, towit: To said Giles W. Featherston, A. Shorter, G. W. West and A. Huntington, amounting in the aggregate to eleven thousand dollars; now the further consideration of this deed is that the said Featherston is to pay off and discharge said mortgages, he contracting to be liable for the payment of the same only so far as the proceeds of the land will go towards their payment, in no case assuming any individual liability except to faithfully discharge his duty in managing or disposing of said land, so as to make it or the proceeds thereof, if possible, pay off and discharge said mortgages, and to take the trouble and vexation of managing and disposing of the same off the hands of said Richardson; and whenever said Featherston shall in any way pay off or satisfy said mortgages, then all of said lots and parts of lots of land shall belong absolutely to him, discharged from all claims and incumbrances whatsoever, except those hereinafter mentioned and spec-

"This deed is in no case to be so construed or used as to prevent

said mortgagees from foreclosing their mortgages according to law, nor in any way to hinder or delay them in prosecuting their claims according to law, leaving to said mortgagees the same rights and privileges of proceeding at once, should they think best, in the foreclosure of their mortgages and the collection of the money due on the same, as if this deed had never been made.

"It is further agreed that this deed is not to deprive the said Richardson of his right to have laid off, valued and set apart for the benefit of himself and family out of the lands mentioned herein, a homestead according to law. But said Richardson makes this deed expressly reserving to himself the right to encumber the land with a homestead, to be valued and set apart according to the constitution and existing laws of said state; said homestead when so valued and set apart during its legal existence to hold in abeyance and to prevent going into full effect the absolute right of G. W. Featherston. In testimony whereof," etc. (Signed and attested in the usual manner.)

The bill alleged that Featherston had not paid off the debts as was intended by the parties and required by the deed, but had bought up some of them, caused them to be assigned to him, and in turn had assigned them to his wife, who had assigned them as collateral security; that Featherston had also bought up other claims against the estate, which he threatened to enforce, though in fact settled. By amendment it was alleged that the provisions in the deed were conditions; but if held to be covenants, that the land should be sold to meet them, Featherston being insolvent. It was also charged that decedent had obtained a homestead in said land after the making of the deed; that a receiver had been appointed and sale been made of lands not covered by the homestead; that defendants were seeking to hold the claims open until they should accumulate sufficiently to absorb the entire estate. Waste was also charged. The prayer was to set aside the deed to Featherston and recover the land, or else to enforce its terms, require a sale and settlement of the claims; for injunction, receiver and general relief.

The defendants demurred to the bill on the following grounds:

(1.) For want of equity.

- (2.) Because the bill was multifarious.
- (3.) Because complainant had an ample remedy at law The court overruled the demurrer, and the defendants excepted.
- C. N. FEATHERSTON; J. A. BLANCE; IVY F. THOMP-SON, for plaintiffs in error.

JANES & RICHARDSON; DABNEY & FOUCHE, for defendant.

JACKSON, Chief Justice.

The error assigned in this record is the judgment of the court overruling the demurrer and retaining the bill.

The purpose of the bill is to set aside a deed made by the complainant's intestate, on the ground that the grantee had no title to certain lands conveyed by the intestate, because he had wholly failed to carry out the trusts confided to him, upon the fulfilment and performance of which his title to the land conveyed was to be absolute, but not before; or in the event that equity would not have the deed set aside and canceled absolutely, then that a decree be had compelling the grantee to fulfil the trust confided to him by the decedent, or deliver up the deed and restore the land to the estate.

This is the sum and substance, the aim and scope of the bill and amendments.

The equity of the bill rests, in the main, on the construction of the deed.

These words appear in it: "Now, the further consideration of this deed is that the said Featherston is to pay off and discharge said mortgages (previously described), he contracting to be liable for the payment of the same only so far as the proceeds of the land will go towards their payment, in no case assuming any individual liability except to faithfully discharge his duty in managing or dis posing of the land, so as to make it or the proceeds thereof,

possible, pay off and discharge said mortgages, and to ake the trouble and vexation of managing and disposing f the same off the hands of the said Richardson; and whenever the said F. shall in any way pay off or satisfy aid mortgages, then all of said lots and parts of lots of and shall belong absolutely to him, discharged from all laims and incumbrances whatsoever, except those hereinster mentioned and specified." Those thereinafter mentioned and specified are that the mortgagees may foreclose, and that a homestead for the grantor may be carved out of the land, which is "to hold in abeyance and to prevent going into full effect the absolute right of G W. Featherston."

Without invoking the aid of surrounding circumstances, which, if the instrument itself were doubtful of construction, could well be invoked by parol, and which are set out in the bill, we are of opinion that its meaning is quite apparent from inspection. Its own light is enough to enable one to read it without pouring other rays upon it.

Two considerations are expressed in it, one is the usual trifling and formal consideration of ten dollars at its beginning, and the other and the real consideration is the extinguishment of the mortgages by "managing or disposing of the land," and relieving the grantor from "the trouble and vexation" of doing so himself.

This real consideration on which the title to the grantee is to become absolute—it being in him before in the former part of the deed, to enable him to manage and dispose of it to extinguish these mortgages—the bill alleges has not been performed at all by him, but the lands have been used for his own profit and emolument. Some of the mortgages are unpaid; others, which have been paid, are transferred to the wife of the grantee, and are outstanding in her name, with the view that the interest accumulating on them may eat up the entire lands. Thus the consideration of the deed has absolutely failed, the trust on which it is made has been betrayed, and the confidence

of the grantor abused by this trustee, in whom a quoad hoc sort of title was put to enable him to pay off these mortgages, and upon the performance and faithful discharge of which trusts, and not until that performance and faithful discharge, the title to him individually and absolutely was to pass. The very consideration on which it was to be absolute or perfect, or freed from the mere character of a deed with power to manage and sell, is the faithful execution of the trust. It has not been faithfully executed, but fraudulently turned to the benefit of the trustee and his wife, if the bill be true, and the demurrer admits its truth.

Ought it not then to be canceled and annulled by a court of equity? Could not this grantor have gone into equity and demanded its cancellation in his life time? If so, may not his legal representative do so now under this bill? Shall he hold the land and not pay for it what he agreed to pay, to-wit, the relief of the grantor from the trouble and vexation of managing and selling the lands so, as to extinguish the liens thereon—a payment which he has not made and can now never make, because the grantor is now free forever from all earthly vexation and annoyance?

Without considering, therefore, the surrounding circumstances, or any other charges in this bill, such as the insolvency of the grantee, his disclaimer of title while the grantor lived, his failure to record the conveyance during that life-time, his transfer of the mortgages to his wife, etc., there is equity in it springing out of the deed itself, and the utter failure to perform the trusts expressed therein, to require its retention in court and to demand a thorough and full trial thereof on the merits. The demurrer, in any view we can take of it, was properly overruled, and the judgment must be affirmed.

The entire bill, amendments and all, points to these lands, to the fraudulent use of a legal quasi title in them, and to relief from this fraud. In its entirety it appears to us

armonious and not multifarious. In equity all kindred auses may be embraced and all parties summoned to her par, by amendment, which are necessary to adjudicate the questions at issue, and to complete the justice she seeks to mete out to all.

Judgment affirmed.

Cited for plaintiff in error: Code, §§3480, 2309, 2310, 2295, 3115; 2 Wash. Real Prop., 3 (2), 10 (11), 6 (4), 11 (10), 12 (13), 18 (19), 20, 7, (5), 4 (bottom); 1 Perry on Trusts, 124, 134, 135, 137, 153; Hill on Trusts, 91, 120; 20 Ga., 563; 15 1b., 103; 5 1b., 341; 13 1b., 192; 40 1b., 199, 204; 1 Doug. R., 225, 527; 4 Kent., 130, 129, 132; 2 Story, 1319, 1494, 1509; 53 Me., 213; 14 Allen, 69; 4 Watts and S., 149; 30 Ind., 228; Har. and J., 551.

For defendant: Code, §2316; 2 Story Eq., 972, n, 4, 1036, n. B.; 1 Vol. Leading Cases in F.q., 304, 307, 327.

# MANLEY et al. vs. AYERS et al., executors.

- 1. Where land which had been sold by a defendant in fi. fa. was levied on, a bill filed by the purchaser to settle his rights, an agreement between the plaintiff in fi. fa. and the complainant made, whereby the former were not to proceed against this land and the latter was to dismiss his bill and pay costs, which he did, the land was thereby released from the fi. fa., and it could not be subjected at the instance of subsequent transferees thereof. Aliter if the contract not to enforce the fi. fa. against this land was conditional upon the payment of it by defendant from other sources, which was not carried out.
- 2. Where the land of a defendant in fi. fa. was sold to two purchasers, and the defendant, with certain persons as securities, entered into a bond to indemnify and protect the second purchaser against the fi. fa. as part of the contract of sale to him, upon the subsequent transfer of such fi. fa. to the securities, the bond in effect released the land of the second purchaser, and therefore operated as a release to the first purchaser, who had bought for value before the making of the bond.

Levy and Sale. Executions. Contracts. Claims. Before Judge ERWIN. Franklin Superior Court. October Term, 1881.

Knox sold certain land to Dorough, who in turn sold a part of it to Cobb, and subsequently a part to Tucker. Dorough held only a bond for titles from Knox, and Cobb a bond for titles from Dorough. Cobb sold to Avers. In the meantime Knox recovered judgments against Dorough for balance of purchase money due, and fi. fas. issued-At the time of the sale to Tucker, Dorough entered into a bond with Manley et al. as securities, to protect the purchaser against the purchase money fi. fas. in the hands Knox having died, his executor, Cornog, caused a levy to be made on the lot bought by Cobb, and at that time held by him. He filed his bill setting up that, though he had no deed, the purchase money had been fully paid, and that Knox knowingly had received a large portion of it on his debt, had stood by and seen complainant making improvements, etc.; he prayed to have his title established. Before filing the bill, he had filed a claim which was then pending. Both the bill and the levy were dismissed. Why or on what terms this was done the evidence is conflicting. Estes, the attorney for plaintiff in fi. fa., testified that Dorough agreed to pay the debt in monthly installments of \$100.00, and that, having confidence in him, witness agreed to dismiss the levy, but not to disclaim a right to relevy if Dorough failed to make the payments. Cobb testified that he had previously paid all of the purchase money, and that it was agreed that the matter should be dropped, and the fi. fas. not enforced against him, and that he dismissed his bill. After this a levy was made on the lot bought by Tucker, and it was found subject. (See 58 Ga., 443.) The securities on the indemnity bond thereupon bought up the fi. fas. and caused them to be relevied on the Cobb lot, which had then been sold to Ayers. A claim was interposed. Ayers

having died, his executors prosecuted the claim. The property was found not subject.

The transferees of the fi. fas. moved for a new trial, alleging as error that the court charged that if the contract was as stated by Cobb in regard to the dismissal of the bill, the land, so far as this point is concerned, would not be subject, but if certain fi. fas. were to be extinguished as part of the agreement, and it was not done, the land would be subject.

Error was also assigned because the court charged, in effect, that the indemnity bond to Tucker released his land from the levy, and the effect of that would be to release Cobb, whose money Knox had received.

The motion was overruled, and plaintiffs excepted.

J. S. DORCH; S. P. THURMOND; BARROW & THOMAS by brief, for plaintiffs in error.

SPENCER M. SMITH, for defendants.

JACKSON, Chief Justice.

1. On the trial of this claim case it appears that the claimants held under one Cobb as purchaser from the defendant in execution, and who had bought from the original plaintiff in execution. The claimants contended that a bill had been filed by Cobb against the executor of Knox, setting up payment which Knox got for the property here levied on, and other equities, and that bill was dismissed by Cobb with the distinct understanding and agreement that this property should never be subject to these fi. fas. The court charged that if that was so, the transferees of the fi. fas., who got them after this contract, could not sell the land levied on; but if the agreement was that Dorough should extinguish and pay up certain of the f. fas., and he had not done it, then the property would be subject so far as this point is concerned. On this charge error is assigned. There is no error in it. Cobb swore positively that such was the contract, as he stated it, and

Estes' recollection was different; but all agreed that Cobb had paid all the purchase money to Knox.

It was a question of fact for the jury, and the court was right to submit it. If Cobb dismissed his bill, it was a good and valid consideration to support the agreement not to molest the land he bought and paid for further. The fi. fas., let it be noted, were for purchase money of a body of land or parcels of lands of which that levied on was part; and it is reasonable and equitable that Cobb's part paid for should not be made to pay for the rest too.

2. It is further insisted that the court erred in charging on another point. It seems that the present transferees and plaintiffs in error here had given a bond to indemnify a purchaser of other parts of the land sold by Knox against these executions, and after the dismissal of the bill by Cobb, and the arrangement then entered into, they got control of the fi. fas. to save themselves from the breach of that bond, and levied on this land to make it pay the fi. fas. they bought for that purpose. On this state of the case, the court charged to the effect that, as the present plaintiffs in execution had by bond released a part of the land subject, and while it was levied on and could have been sold, they could not subject this part; that their conduct in so acting, if they did so act, would operate also to discharge this part of the land paid for by Cobb, and which money Knox, the original plaintiff, got.

We see no error in this charge, fully reported in the motion for a new trial, and as the facts would also support a verdict thereon, the judgment is affirmed which denied the motion for a new trial. Indeed the points ruled in 58 Ga., 443, Tucker vs. Cornog, executor, a branch of this same transaction, must control this case. That case rendered Tucker's part of the land subject, and Tucker is the party which these plaintiffs agreed to indemnify. Equity will not permit them now to subject Cobb's purchase.

Judgment affirmed.

## WHITE vs. FULTON.

- 1. Where a suit was brought against a husband and wife for money borrowed, and, upon plea by the latter that the debt was her husband's, it was sought to bind her by showing that some of the money was used on a trust estate held by her husband for her, it was competent to prove in rebuttal of this the character of the trust estate, as tending to show there was no necessity to borrow money therefor.
- 2. In a civil case, where the jury cannot reconcile conflicting testimony, they may find a verdict according to the preponderance thereof; such preponderance is considered sufficient to produce mental conviction.
- 3. Juries should be left free to act without any real or seeming coercion on the part of the court. Still, where the court, after inquiry as to the probable agreement of the jury, gave them the rule as to the preponderance of testimony recited above, stated to them that there had been no mistrials since his administration began, and that if juries would follow his rule there would be no necessity for mistrials, and thereupon remanded them for further consideration, but did not intimate any opinion or otherwise coerce them, this will not necessitate a new trial.

Evidence. Husband and Wife. Trusts. Jury. Charge of Court. Practice in Superior Court. Before Judge SNEAD. McDuffie Superior Court. September Term, 1881.

Reported in the decision.

A. J. COBB; THOS. E. WATSON, for plaintiff in error.

W. M. & M. P. REESE; WM. GIBSON; W. D. TUTT, for defendant.

SPEER, Justice.

Plaintiff in error brought his action upon several promissory notes signed by M. C. Fulton and V. F. Fulton A recovery having been had on a former trial against M. C. Fulton, the issue submitted on this trial was as to the liability of V. F. Fulton.

### White vs. Fulton.

To this action Mrs. V. F. Fulton pleaded the general issue, and also that the contracts sued upon were signed by her as the security of her husband, M. C. Fulton, and in an assumption of his debt, she being in no wise interested in the consideration thereof.

Under the evidence and charge of the court, the jury returned a verdict for the defendant, whereupon plaintiff made a motion for a new trial, which was refused by the court, and plaintiff excepted.

- I. One of the grounds of the motion was error in the court in allowing the introduction, as evidence, of a trust deed, made in favor of defendant, in which there was set forth the character and description of her separate estate, over the objection of counsel for plaintiff. Under the issue and evidence, we do not think this was error. It was shown by the evidence offered by plaintiff, in reply to the plea of defendant, that both the makers of the notes sued on admitted that \$2,500.00 of the money borrowed were used and expended on the trust estate of the defendant, and the trust deed was offered to show that a portion of the trust property consisted of certain stocks, etc., that were available as money, and that there was, therefore, no necessity to borrow money for the use of the estate. There being a conflict in the testimony as to how the money borrowed was used, we think the character of the trust property, as shown by the deed, was competent to rebut this evidence of the plaintiff. How far it rebutted was a question for the jury.
- 2. Neither do we find any error in the court's inquiring, through the officer in charge of the jury, "whether they had agreed or were likely to agree upon a verdict," and on an answer in the negative being returned, for the court, on its own motion, to recall the jury to their box and give them in charge a rule of law as to their right, "when there is a conflict in the evidence of witnesses and they could not reconcile the same, that they might find a verdict according to the preponderance of the testimony."

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The charge of the court being substantially as follows: "If you disagree about a matter of law, I could aid you, but as it is a matter of evidence, I cannot aid you as you are the judges of the evidence, except by some rules of law for your guidance. I can, however, give you this rule: In a civil case, where the jury cannot reconcile the testimony of witnesses conflicting, they can find a verdict according to the preponderance of testimony. If you will follow this rule, I think you will have no difficulty in arriving at a verdict. If juries would follow this rule, there would never be any necessity for a mistrial ir a civil case. I have been judge of this circuit for three years, and if you make a mistrial it will be the first one made in the circuit since I have been judge. Go to your room, and make an honest effort to agree on a verdict, and follow the rule I have given, and I don't think it will trouble you in agreeing."

We see no invasion of the province of the jury as complained of in the charge of the judge, as above given.

The Code, section 3749, declares, in all civil cases, "the preponderance of testimony is considered sufficient to produce mental conviction," and this was the rule the court charged. The judge gave no intimation as to which side the preponderance tended. As to the remarks of the court on the subject of mistrial, etc., while we cannot endorse fully all he said on this subject, yet we do not consider it sufficient to reverse this judgment. Under our view the court, should abstain from making any remarks to a jury that would bear even the semblance of coercion to secure a result. Juries should be left free to act without any real or seeming coercion on the part of the court, and the verdict should, as to the facts, be the result of their own free and voluntary action.

It has often been announced by this court "that where the evidence is conflicting, and no rule of law has been violated, and there is sufficient evidence to sustain the verdict, this court will not interfere." Healey vs. Dean et al.

As we find no error of law in this record, on the part of the court, and the evidence is sufficient to sustain the verdict, the judgment below is affirmed.

Judgment affirmed.

## HEALEY vs. DEAN et al.

- I. On an application to the commissioners of the port of Darien for a license to be issued to the applicant as a pilot, pilots already licensed could not be made parties to the proceeding, oppose the grant of a license and carry the judgment granting it to the superior court by certiorari, as if it were a judgment of a court in a case in which they were interested. The commissioners should not hear them otherwise than as witnesses in respect to the competency of the applicant or committees to examine him.
- 2. Where the applicant for a license to act as pilot has served two full years in a decked boat, there is no necessity for the mayor or chief officer of the port to determine that an emergency exists before a license can be issued to him. Code, §1535.
- (a.) The commissioners are vested with full power and ample discretion as to granting licenses to pilots, and if it were necessary to the validity of their judgment to have had the testimony of the mayor or chief officer as to the existence of an emergency, jurisdictional facts appearing, the presence of proper testimony will be presumed.
- 3. Even if the commissioners had been such an inferior tribunal as that this certiorari could have been sued out, the case being one which turned on facts, it should have been remanded for a new trial, and not finally adjudicated in the superior court.

Courts. License. Pilots. Darien. Certiorari. Practice in Superior Court. Before Judge FLEMING. McIntosh Superior Court. May Term, 1881.

Reported in the decision.

LESTER & RAVENEL; W. R. GIGNILLIAT, for plaintiff in error.

GARRARD, MELDRIM & FRASER, for defendants.

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Healey vs. Dean et al.

# JACKSON, Chief Justice.

The plaintiff in error made application to the commissioners of pilotage of the port of Darien for license to serve in the capacity of a pilot. The license was resisted by other pilots of the port, but after a thorough investigation of the case, it was granted to the applicant. Thereupon the objecting pilots applied to the judge of the superior court of the Eastern circuit for a writ of certiorari, which was issued, and on the trial of the certiorari the judgment, if judgment it can be called in legal parlance, was reversed, and the license revoked by the superior court. This judgment was excepted to, and error is here assigned that it is contrary to law.

1. Did the other pilots have any legal right to intervene and be made parties and carry the case to the superior court by writ of certiorari? We doubt it very seriously. The statutes on the subject, codified from sections 1504 to 1542 of the Code inclusive, gives them no such right, and we know of no other statute or law which authorizes their interposition. The case illustrates the impropriety of giving them that right. Three of their number were appointed to examine this applicant, to test his qualifications, and two of the three were parties to the case, if it were a case judicially speaking, and, as might be expected, reported on their side and against the applicant, without assigning any reason therefor, whilst the other, not a party at all, reported that he was fully competent, with facts drawn from his examination on which to base the report he made.

In the absence of any express law giving these people the right to subject every man who applies to engage in the same business with themselves to the costs of a lawsuit, and thus to deter applicants, when the commerce of the port stood in need of more pilots, from making application as well by law-suit as by the hostility of the esprit du corps, we do not think that public policy would author-

Healey vs. Dean et al.

ize the courts to stretch any analogy so as to embrace, as legal parties, men of any class who are licensed to do business of any sort against a new applicant for license therein. For this reason we think that the commissioners made a mistake in hearing their objection as parties in a case at law, or in any other character than as witnesses to testify in respect to qualifications, or committees to examine the applicant, and that the judge, in sanctioning that mistake by recognizing them as parties and sanctioning a certiorari at their instance, also made a mistake. As well might physicians, dentists, pedlars, liquor sellers, and lawyers, be allowed to make themselves parties, and contest before the license-granting board or official a matter in the discretion of these authorities, and then sue out the writ of certiorari and have the license revoked by the superior court. The question is not whether these several officials are not judicatories in some respects, and as to certain matters, but can others whom they have licensed, make a law-suit out of every grant of license by them, and test it in all the courts? We hardly think so. If at this threshold these objectors were mere intruders, certainly the court was wrong in revoking a license at their instance.

2. But the court rested its judgment on the ground that no emergency had been adjudged by the mayor or the chief officer of the port under section 1535 of the Code. Suppose the construction put on that section by the learned and venerable judge be correct, and that the emergency must be passed upon by the mayor or other chief officer when one not fully qualified applies for license, yet that law would not apply when one qualified by two year's service in a decked boat made the application. See section 1535 of the Code. When examined this applicant answered a direct question to that point, and affirmed that he had served on such a boat, and more than the time required; and that fact was before the commissioners and undisputed, so far as we can ascertain from the record and bill of exceptions, and if disputed, it was fer

## Healey vs. Dean et al.

them (the commissioners) to pass upon that contested issue of fact. There is no limit to the number of pilots who are thus qualified, except in the discretion of the commissioners—see sections above cited—and the necessity of any body's passing on the issue of emergency, and the number then to be licensed, only arises when some disqualified person makes application for license.

Besides, this emergency issue in this case was passed upon by the board of commissioners more than three months before the application for the *ccrtiorari*, and that judgment, if judgment it was, was too old for review and reversal by the writ.

Further, this board of commissioners had jurisdiction of this whole business of granting licenses to pilots, and only jurisdictional facts are necessary to appear of record—not the evidence on which the judgment is based,—and the board may have had evidence that one pilot was needed, if that were necessary, from the verbal statement of the mayor or other officer. The statute does not require the determination to be in writing, nor does it leave to the mayor any determination about it, except the number; and one is the very lowest number, and only one had applied, and but one pilot was licensed.

3. Besides all this, the court did not send the case back to have the facts retried by the board, or to have the assent of the mayor if needed, or testimony on that point re-examined, but made a final disposition of the cause and revoked the license, and that in the teeth of evidence that the plaintiff in error was qualified without regard to emergency or any provision in section 1535. We have ruled repeatedly that where facts are involved and in dispute, the superior court must send the case back for a rehearing and cannot make a final judgment. So that even if the court thought that the *certiorari* should be sustained, the judgment was wrong.

These commissioners are invested with large discretion by law—Code, §§1504 to 1542 supra—and ought to be so clothed. The courts should require a clear case of ille-

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The State vs. Gaskill et al.

gality, or a strong case of abuse of discretion on facts, before they interpose. In this case it is clear that these commissioners acted with much deliberation and examined the entire business before them with great care, and in our judgment their grant of this license to the plaintiff in error should not have been revoked or interfered with by the superior court, but the *certiorari* should have been dismissed.

Judgment reversed.

Cited for plaintiff in error: 14 Ga., 162; 20 Ib., 77, 233; 30 Ib., 88; 57 Ib., 495; 5 Ib., 185; 22 Ib., 369; 55 Ib., 315; 65 Ib., 600; Code, §§4052, 4049, 1504 et seq.; 1394 et seq.; 1410 et seq.; 1631 et seq.; 1419 et seq.; 1703, 1705, 2137; 1 Arch. Pr., 208, 210; Bacon's Abr. Tit. Error, Style; Co. Lit. 288 b; 1 Bouv. L. D. Tit. Judgment, 65; Ram. on Leg. Judg., 52; 2 Bouv. L. D. 284; 1 Green. Ev., 523; 20 How. St. Tr., 538 a; Cobb's Dig, 32; R. M. Ch. R., 302; Dean vs. Healey, March 29th, 1881.

For defendant: Code, §§1504-5, 1535, 4049, 387, 396, 1508, 1532, 4052, 1504 to 1542 inclusive; 14 Ga., 164: 20 Ib., 77; 35 Ib., 285; R. M. Ch. R., 302.

# THE STATE OF GEORGIA vs. GASKILL et al.

[This case was argued at the last term, and the decision reserved.]

Except in cases expressly provided for by law, the superior court has no power to render judgment at the first term after suit brought so as to bind third persons thereby. If a confession of judgment, and judgment entered up thereon at the first term, would be good against the defendant upon the principle of consent or waiver, it could not affect a claimant; therefore on the trial of a claim, there was no error in dismissing the levy of the execution issued on such a judgment.

Jurisdiction. Judgments. Nullities. Claims. Before Judge HILLYER. Fulton Superior Court. April Tem, 1881.

#### The State vs. Gaskill et al.

On March 19th, 1872, Charles P. McCalla, as an informer, made affidavit that Varney A. Gaskill was indebted to the state of Georgia the sum of fifteen thousand five hundred and forty eight dollars and fifteen cents, and that Gaskill was a non resident. He gave bond, and attachment issued in accordance with the act of December 15th, 1871. A levy was made, and a declaration, in attachment filed March 19th, 1872. During the next term (the April term, 1872,) of Fulton superior court, the following judgment was entered by agreement:

"On agreement among the state and the informant, both represented by counsel in open court, and the defendant, who appeared in person, it is ordered that the state of Georgia do recover in the above stated case the principal sum of eight thousand six hundred and fortyeight dollars, with interest from the ninth day of January, eighteen hundred and seventy-one, the one-half of said principal and interest to be paid by the first day of January next, the other half to be paid by the first day of November, eighteen hundred and seventy-three. Execution to issue for the enforcement of said payments, if they are not punctually made, and also for costs. It is further ordered and adjudged on agreement as aforesaid, that this judgment, when paid, shall fully discharge the defendant, Gaskill, from all liability for the whole and for every part of the claim made against him in this case, not discharging any other person who may be liable for any part of said claim-It is further ordered and adjudged by the court, that out of the money which may be collected from the foregoing judgment, the informant, McCalla, and his counsel, shall be allowed the sum of twenty per cent on said recovery. By the court,

JOHN T. GLENN, Sol. Gen'l."

Execution issued, and was levied on certain property to which C. B. Gaskill et al. interposed a claim. On the trial, these facts appearing, claimants moved to dismiss the levy on the ground that there was no judgment which was valid as against them. The court sustained the motion and dismissed the levy, whereupon counsel for the state excepted.

CLIFFORD ANDERSON, attorney general; COLLIER & COLLIER; J. T. GLENN; P. L. MYNATI; B. H. HILL, Jr., solicitor general for the state.

The State vs. Gaskill et al.

McCay & Abbott, for defendants.

JACKSON, Chief Justice.

The only question made by this record is, can the superior court render a judgment at the first term, so as to bind third persons, except in cases expressly provided by law?

The case at bar is between the state as plaintiff in execution and other parties who claim adversely to the defendant in execution; and these claimants attack the state's judgment as a nullity against them because it was rendered at the first term of the court, they not being parties to the judgment or assenting thereto. As the judgment was by consent, the defendant would be estopped from attacking its validity. It is a compromise judgment, and a valuable consideration passed from the state to obtain it, less than her claim having been taken in the judgment, and part thereof having been relinquished in consideration that the defendant would then give her judgment for what appears now on the face of it. So that it is good as to the defendant. But does it bind from its date the property of others? Is it good against them?

The general law is that judgment may go by default at the first term where there is no answer by defendant, but the trial of the case must be at the second term, and the penalty of default is only the payment of costs. The language of the law even in cases by default is that "no such trial shall in any case be had at the first term, except specially provided for by law." Code, §3457. In matters of rent it is provided that trial be had at the first term; but in cases like this, we know of no law which authorizes the court to enter a judgment so as to bind third persons. Therefore this judgment at the time it was rendered under the law was coram non judice so far as others than parties thereto are concerned.

And the judgment of the court below so .holding it must be affirmed.

Judgment affirmed.

Mathews vs. Starr.

## MATHEWS vs. STARR.

1. Property of S. was levied on and advertised for sale. M. agreed that if S. would permit him to buy it at sheriff's sale, and would not have the price run up on him, that he would buy and would pay to S. the difference between the price paid at the sale and \$1,000.00, which S. claimed to be a fair valuation. Relying on this, S. made no effort to pay the f. fa. or stop the sale as he could otherwise have done. M. hought for \$625.00. S. sued for the balance to complete the \$1.000.00:

Held, that the contract was founded on a sufficient consideration.

- 2. Such a contract was not illegal.
- 3. If the proposed purchaser desired to annul the contract, it was incumbent on him to have given notice to the defendant in f. fa., in ample time for him to have made other arrangements.

Contracts. Sales. Before Judge POTTLE. Elbert Superior Court. September Term, 1881.

Reported in the decision.

D. M. DUBOSE; JNO. P. SHANNON, by brief, for plaintiff in error.

A. G. McCurry; Geo. C. Grogan, for defendant.

JACKSON, Chief Justice.

This action was brought by Starr to recover from Mathews \$375.00, on an agreement that if the former, having property levied on for sale by attachment, would not protect it from sale or get other parties to bid it off for him, and run it against Mathews, then Mathews would pay Starr the difference between what he paid for it and \$1,000.00, which Starr thought he could make it bring.

The jury found \$375.00, Mathews having bid off the property at \$625.00, and \$375.00 being the difference between the \$1,000.00 and the purchase money paid by

Mathews vs. Starr.

Mathews. A motion was made for a new trial, and on its denial error is assigned.

- 1. There is sufficient consideration to uphold the contract. If not carried out, Starr would have been injured. He received the promise from Mathews, and thereby lost his chances to make the property bring more money. It was a beneficial contract to Mathews. It would enable him to free himself from the competition which the defendant might have brought against him if the property was sold, as well as from the efforts of Starr to arrange not to let the property go to sale. "A consideration is valid, if any benefit accrues to him who makes the promise, or any injury to him who receives the promise." Code, §2740.
- 2. Was the contract illegal? Under the facts disclosed in the record, we think not. The allegations are: That in the latter part of 1874 said Starr purchased from one W. A. Royston one undivided fourth interest in a mill on Beaverdam Creek, in Elbert county, agreeing to pay for this interest seven hundred and fifty dollars; that he got no deed from Royston and had paid Royston to January 16th, 1877, about five hundred dollars, and had expended about one thousand dollars for improvements and repairs of said property; that about January 16th, 1877, said Starr, intending to be absent from the county, made, without any consideration, to said Mathews and one A. C. Mathews, a deed to his interest in said property for the purpose of getting them to manage his interest in his absence, and took from the said Mathews a bond to reconvey said interest to said Starr any time after January 1st, 1878; that during the year 1877, said David A. Mathews became the owner of the remaining three-fourths of said mill property; that during the said year said Royston sued out an attachment against said Starr for the unpaid balance of the purchase money of said Starr's one-fourth interest, said balance amounting, with interest and costs, to about five hundred dollars, under which attachment proceedings said interest was levied on and advertised for

#### Mathews vs. Starr.

sale the first Tuesday in January, 1878; that before the day of sale, plaintiff in error, said David A. Mathews, contracted and agreed with him, said Starr, that if said Starr would let his interest go on and sell, that he, said Mathews, would pay him, said Starr, the difference between what it should be bid off at and one thousand dollars; that he, said Starr, could have settled off the purchase money and found other legal means to prevent the sale of said interest, but relying on this contract of Mathews. did not do so, but the property was sold on the first Tuesday in January, 1878 to said Mathews for six hundred and twenty-five dollars; that of the one thousand dollars agreed to be paid by said Mathews, eight hundred was cash and two hundred in November, 1878; that on account of this contract Mathews is indebted to Star one hundred and seventy-five dollars, with interest from January 1st, 1878, and two hundred dollars with interest from November 1st, 1878, and to recover these sums Starr brought his suit. Starr alleges full compliance upon his part with his contract, his reliance upon Mathews' compliance, and Mathews' failure and refusal to comply.

It was a question of fact for the jury, whether these allegations were made good by proof. On that issue there is conflict in the testimony, and the jury settled it. The case in 41st Ga., 283, is much in point, and settles, we think, the law of this case, and the jury having settled the facts, the case is with the defendant in error.

3. The court charged the jury: "If you believe from the evidence that the plaintiff agreed with defendant that if he, plaintiff, would let the mill property go to sale the defendant would pay him the difference between what it brought at the sale and one thousand dollars, and by reason of such agreement the plaintiff was lulled into security, and did not make any arrangements to redeem the land, the plaintiff is entitled to recover, unless that contract was annulled. I charge you that the defendant had a right to make the agreement with or without a reason, provided

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he gave plaintiff notice in ample time to enable the plaintiff to make arrangements to prevent the sale of the property."

This charge is excepted to, but it seems to us to embody the law of the case in few words. Good faith demanded that Mathews give Starr notice if he rescinded the contract, so as to put Starr where he was when the trade was made, and give him a chance to make other arrangements to prevent his property from being sacrificed.

Judgment affirmed.

## GORMAN et al. vs. WOOD.

- 1. While prior to 1861 the husband might permit his wife to keep her earnings and buy property during coverture, which she could hold as against him and volunteers under him, yet after receiving her funds, investing them in his own name, and holding property purchased therewith until the lien of a judgment against him had attached, he could not then set up her equity so as to defeat the title of a bona fide purchaser under the judgment.
- (a.) Nor could that result be accomplished by the husband recognizing her equity and allowing a deed to be made to her after the lien of the judgment had attached to the land.
- If a husband uses the money of his wife, with or without her consent, and thereby acquires title in himself to property, third persons who bona fide take title for value to such property will be protected.

Husband and Wife. Title. Trusts. Equity. Debtor and Creditor. Before Judge SIMMONS. Bibb Superior Court. October Term, 1881.

Reported in the decision.

LANIER & ANDERSON, for plaintiffs in error.

J. RUTHERFORD; BACON & RUTHERFORD, for defendant.

#### Gorman et al zu. Wood.

# CRAWFORD, Justice.

About the year 1860, George Wood bought of one Thompson the land which is the subject-matter of this controversy, and paid him \$330.00 in cash for it, took a bond for titles, went into possession, gave in the same for taxes as his own up to the year 1876, and sought homestead therein before that date. In the year 1874 he became security for one Merritt upon a bond, on which a judgment was obtained in November, 1875, and a fi. fa. issued, the property sold, bought by the Wilson Sewing Machine Company, which went into possession under the sale, and this suit is brought by Rachel Wood, the wife of the said George, to recover the same.

She rests her title upon the ground, that the money which paid for the land was hers, made by her whilst keeping a boarding house, and which her husband allowed her to have. She also claimed to have collected the rents from the tenants as belonging exclusively to herself. In addition to the foregoing facts she relied upon a deed made by Thompson to her in the year 1876.

The questions made in the trial below and involved in this appeal are, what is necessary to secure to the wife her earnings prior to 1861, and the act of December, 1866. And when such earnings are hers, and invested in land by the husband, with bond for titles taken to himself, and he exercises other general acts of ownership over it until a judgment be obtained against him, has the wife such a right therein as will defeat the title of a bona fide purchaser, even though she may have subsequently acquired a deed thereto?

That the husband might, anterior to 1861, permit his wife to have her own earnings, whilst they lived together, and allow her to buy property, taking title to herself by his consent, which she can hold as against him and volunteers under him, has been recognized by this court in 30 Ga., 386, and in 36 Ib., 506. And so also after the act of

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1851-2 her acquisitions and those of her children, whilst living separate from her husband become vested in and are absolutely her separate property, free from all debts, contracts or control of her husband. But it nowhere appears that the legislature or the courts have gone further, and allowed the wife to buy property through her husband, pay the money through him, hold the evidence of title in his name, and after a judgment is obtained against thim recognize in her an unknown secret trust, existing alone in parol, and of which no actual or constructive notice exists.

Whatever may have been the common law as to the right of the wife to her pin-money, it cannot affect the question raised in this case under our statute; nor does the case in the 30th Ga., 386 of the baking cakes by the wife; as the business here claimed to have been pursued was that of keeping a public house for the entertainment of boarders, and for the collection of which board the wife could not in her own name have collected a dollar by suit, unless the statute making her a free trader had been complied with.

But it is said that although the title might not have been in the wife prior to 1866, yet if the husband recognized it after that time as being in her, because the money that paid for it was hers, then that would give her a perfect title, and if afterwards she got the deed, that it would relate back to the time of the purchase and protect it as hers.

To support this view, the case of Sterling vs. Arnold, 54 Ga., 690, is relied upon; but the difference between the cases is, that the money of the ward went into the land in that case, and in this, as appears from the proof, it was the money of the husband under the law, and not that of the wife.

It is further said, that the act of 1861, allowing the wife to deposit her earnings in savings banks and control it, dispose of it, and devise it, is to be con-

### Gorman et al vs. Wood

strued in favor of the wife's right to invest in land, etc. However this may be, it cannot affect this case, as the purchase and payment were made before the act was passed.

But, supposing the money to have been really the property of the wife, and the husband had purchased the land therewith, how would the case stand? In Moye vs. Waters, 51 Ga., 15, 16, this court say: "The mere fact that property is purchased by one, and paid for with the money of another, does not vest the title to such property as against third persons in the one whose money paid for Nor does any legal or equitable right spring out of such a fact in favor of such person, against innocent purchasers who in good faith take the title from one who is apparently the true owner, and in truth is so, except as to some secret equity of the party whose money has been used. There must be notice of such an equity before it. can avoid a title, otherwise good. Hence, if a husband uses the money of the wife, with or without her consent; and acquires thereby title in himself to other property, third persons who bona fide take title for value from him to such property will be protected."

George Wood bought this property in 1860, paid all the purchase money and went into possession, this gave him a complete equity without any conveyance, bond or title. 54 Ga., 602. This of course, provided the money was his, if it were his wife's, then she would have a complete equity which she could enforce as against him, provided she enforced that equity before credit was obtained upon the land by the husband, or there were judgment liens that had fastened upon it. But his having obtained credit without any notice of her equity, or having the lien of a judgment attach to this property, it would be inequitable and illegal to allow such intervening equity to destroy the rights of purchasers or bona fide creditors. 56 Ga, 75; 54 Ib., 543.

Besides, if it be true, as is claimed by counsel for de-

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femdant in error, that the deed under which Rachel Wood claims title was obtained from Thompson with the view of defeating the collection of the debt against George Wood, and this was known to her, then such deed would be fraudulent and void.

There being no sufficient evidence to show that Wood ever yielded his right to this money, or his title to the property, until after the judgment was obtained against him, it does not even bring the case within the legal rule given by the court to the jury, and it should therefore have been withheld. Wood refused to allow the deed to be taken in her name when he bought, he held the bond for titles to himself through sixteen years, gave in the property for taxes in his own name, until the judgment was obtained against him, and never permitted his wife to have the deed to it until it became a question between his execution creditor and herself, then, and not until then, was his consent given.

So that in no view of the case under the law and the facts as shown by the record do we think that this verdict ought to stand.

Judgment reversed.

## AARON et al. vs. GUNNELS.

To ac uire a prescriptive right to a private way over land of another, it is necessary to show the uninterrupted use of a permanent way, not over fifteen feet wide, kept open and in repair for seven years. Mere frequency of passage across one's land, not continuing in the same track for the requisite time, and with no repairs or work done on the alleged way, will not suffice.

(a.) Under the facts of this case, that the court below remanded the case for a new trial when brought before him on certiorari, was quite as favorable a ruling as the claimant of a private way could ask.

Roads and Bridges. Private Ways. Prescription. Before Judge POTTLE. Madison Superior Court. September Term, 1881.

Aaron et al. vs. Gunnels.

Reported in the decision.

B. F. CAMP; L. & H. COBB, by brief, for plaintiff in error.

No appearance for defendant.

CRAWFORD, Justice.

G. W. Aaron et al. petitioned the ordinary of Madison county to have certain obstructions, placed in an alleged private way by Willis Gunnels, the defendant, removed. The ordinary, on the trial of the case, under the evidence refused the application, and the petitioners carried the matter to the superior court by certiorari where the judge, upon consideration of the facts set out and the proofs, sustained the certiorari and sent the case back for a new trial.

With this order and judgment of the court the petitioners were dissatisfied and brought the case here, because a final judgment was not made requiring the obstructions removed.

The private way appears to be a short road running through a part of the defendant's land; is a trifle more convenient than going by way of the public road; the obstruction complained of is a fence; the difference in distance in going through defendant's land and by the public road is only two hundred yards; this nearer way has been used without objection for a great while, and upon this use the prescription rests.

Under the case made, we think that the judge might well have dismissed the *certiorari* and affirmed the judgment of the ordinary, because the petitioners by their proofs did not bring themselves within the requirements of the law entitling them to this private way. Private ways are obtained only by an order from the ordinary, or by prescription of seven years; they are not to exceed fifteen feet in width, are to be kept open, and are to be

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worked by the persons for whose benefit they are established. So far from the evidence showing that these parties ever worked this or kept it in repair, it shows that it has never been worked by any body, and that nothing has ever been done to it except the pulling out of the way any bush or other thing which, by chance, happened to fall into it by the passers thereon.

Again, it appears from the record, that the petitioners have not in fact been using the same fifteen feet of way, which is now in use, more than three years, when seven is necessary to give a prescriptive right. In view, however, of the fact that the judge ordered a new trial, for the reason, doubtless, that he was not satisfied to rule the law of the case without more evidence, we will not disturb his judgment.

In no view of the facts, meagre as they are, can we see that the plaintiffs in *certiorari* should complain. To entitle them to this right of way, they must bring themselves within the ruling of the case in *Short et al. vs. Walton et al.*, reported in 61 Ga., 28, and the strict letter of §721 of the Code.

Judgment affirmed.

## COLLINS vs. MYERS & MARCUS.

- 1. The remedy by injunction and receiver given to all creditors against insolvent traders by the act of 1881 (acts 1881, page 124) is statutory, and in order to take advantage of it, it must appear that the defendant is insolvent and that it would be of benefit to the complainant to have the relief prayed for.
- An allegation of insolvency because the complainant's claim was not paid at maturity on demand is not sufficient, where it appears that the debtor is possessed of unincumbered assets largely more in value than the complainant's claim.
- (a.) That the real estate of the debtor has been mortgaged, does not help a creditor who has no interest in the mortgages. If he can not attack them, and they will consume all of the realty mortgaged, a receiver for the realty would be useless to him.



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(b.) This case is strengthened by the fact that discovery was not waived, and the answer fully meets the charge of insolvency.

Debtor and Creditor. Insolvency. Mortgages. Equity. Receiver. Before Judge SNEAD. Richmond County. At Chambers. March 18th, 1882.

Reported in the decision.

M. P. CARROLL; H. D. D. TWIGGS, for plaintiff in error.

C. HENRY COHEN, for defendants.

JACKSON, Chief Justice.

This bill was filed for injunction and the appointment of a receiver under the act of 1881. Laws of 1881, p. 124.

It will be seen by the act that the jurisdiction of equity to intervene and take possession of the property of the trader at the instance of a creditor rests mainly upon the insolvency of the debtor. It is not the mere failure to pay, but it is the inability to pay by reason of insolvency, that gives this extraordinary remedy. It is purely statutory and must be brought clearly within the statute on which the jurisdiction alone rests. But for this statute a creditor who had not sued his claim to judgment, or did not hold some lien on the property of the debtor, could not interfere therewith in equity by injunction or receivership, or any other such extraordinary remedies not within the rules of common law and common right. This act of 1881 changes the law in this regard, and enables any creditor having any claim on the debtor to invoke the aid of equity in the use of its extraordinary powers against any trader who is insolvent.

So on the very threshold of the courts of chancery stands an impediment which bars the entrance of the

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creditor until he removes it. He must show that his debtor is a trader and that he is insolvent. These complainants wholly fail to show the insolvency of this debtor, and therefore did not remove the barrier which blocked their entrance through the way this statute opened, and they should have been denied admittance. The allegation of insolvency in the bill is wholly insufficient. It is that "your orators show that said debt has matured and that payment has been properly demanded of her, the said Mrs. P. Collins, and has been refused by her, and that as Mrs. P. Collins has failed to pay at maturity after proper demand had been made, your orators allege the said Mrs. P. Collins to be insolvent."

Thus the averment of insolvency rests alone on herfailure to pay at maturity, and the only allegation of fact is her failure to pay. It is a non sequitur that because a trader fails to pay a debt on its maturity, therefore that trader is insolvent. The bill itself, therefore, is not explicit in alleging insolvency, and has no equity in it under this statute.

The answer positively and explicitly denies the insolvency of the defendant, and sets out assets, real and personal, showing solvency by facts alleged in it. Indeed the bill itself, in the very next sentence after the above averment, in respect to insolvency, alleges that the defendant "has a large amount of assets, including choses in action and money, besides real estate, and a large stock of goods, consisting of dry goods, clothing, boots, shoes," etc.

The depositions do not help the complainant's case as made in the bill. They show only the refusal to pay the debt because of dull times and failure to collect her own debts by this trader. These cannot overcome the facts set up in the answer made in response to the bill. Discovery is not waived in the bill, and a sworn answer in response to the bill must ordinarily be overcome by two witnesses, or one with corroborating circumstances, where discovery is not waived. We

### Collins vs. Myers & Marcus.

see no reason why this rule should not apply to an application for an injunction and receiver, the effect of which is to annihilate the business of the trader, strip her of all her property, and administer on her entire estate while she yet lives. But it is unnecessary in this case to pass upon the application of that rule to the trial of interlocutory prayers for injunction or receivership, because in this case there is no sufficient allegation of insolvency, and no proof thereof at all.

That her real estate is mortgaged cannot affect the question, because if the mortgage debt would consume all her realty, equity would not interpose against that mortgage creditor, as ruled in the case of Barnwell et alvs. Wofford et al. decided at the last term, not yet reported: and if it would be more than sufficient to pay that debt, then, as no other indebtedness is shown but the debt due to complainants of some six or seven hundred dollars, she is not insolvent in view of the large amount of personalty which the bill alleges that she owns. The decision in the case cited rests on strong reason. The assets when seized and distributed under this statute must be applied according to the dignity of the debts—the priority of the several claims. If, therefore, though a trader be insolvent, creditors other than the complainants have liens which would exhaust the debtor's effects before the simple contract creditors would be reached in the order of distribution, equity would not interfere with their liens at the instance of those who could realize nothing in any It would be to take away from the lien creditor that which he could reach at but little expense by the ordinary process of common law courts, and waste it in the expensive administraton of a receiver, without benefiting the non-lien complainants one iota. It would enable the complainants to play the roll of the dog in the manger, and prevent others from enjoying that which they could never use.

The conclusion we reach, therefore, is, that before a

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chancellor should enjoin a trader from the free use of all his assets, real and personal, and seize all the property of every kind which the trader possesses, and place it in the hands of a receiver, it must appear clearly that the trader is insolvent, and that if her effects be seized and thus administered in chancery, the complainants would realize from that administration.

Under this statute insolvency must be alleged clearly and upon the basis of such facts as show it. This has not been done, in our judgment, in this case, either by sufficient allegations in the bill, or by sufficient proof on the hearing. The chancellor erred, therefore, in the grant of the injunction and in the seizure of the effects of defendant and placing them in the hands of a receiver.

Judgment reversed.

# NEAL, receiver, vs. FIELD.

- I. Where a witness in answer to a direct interrogatory stated that he was present at a settlement between the parties, and that his understanding was that it was a complete settlement of the entire matter involved, and on cross-examination he stated the facts on which such understanding was based, the testimony was admissible.
- (a.) Would it not have been admissible even without this explanation?

  Ouwre.
- 2. We are not well satisfied that the verdict is supported by the evidence in this case.
- (a.) If one have several claims against another, and by a renunciation of one claim induces a settlement of the balance, he will be bound by such settlement.
- (b.) If matters be submitted to an arbitration in pais, and a party in favor of whom an award is made accepts the results thereof, he will be bound thereby, and cannot re-open the matter.
- 3. This court is less reluctant to interfere with the ruling of the court below in refusing a new trial on the ground that the verdict is contrary to evidence when the same judge did not preside on the trial before the jury and the hearing of the motion.

Evidence. Verdict. Practice in Supreme Court. Ar-

### Neal, receiver, vs. Field.

bitration and Award. Before Judge FAIN. Bartow Superior Court. July Term, 1881.

Reported in the decision.

T. WARREN AKIN; W. K. MOORE, for plaintiff in error.

M. R. STANSELL, for defendant.

SPEER, Justice.

E. E. Field, commenced his action of complainant on account against the intestate of plaintiff in error, in 1870, to recover certain sums of money, which he alleged to be due him, first, on account of sales of certain lands which the parties had purchased at sheriff's sale, and on the agreement that they were, thereafter, to be sold privately and the proceeds divided pro rata between them. Second, to recover also the pro rata share of the plaintiff below in certain amounts of insurance which Tumlin had collected, arising from the insurance, and burning of certain mill property owned by the parties jointly, and which insurance money had never been accounted for.

To this action Tumlin pleaded, first, the general issue; second, that plaintiff had agreed that his *pro rata* share of the insurance money should be paid to J. M. Field, a brother of plaintiff, to whom the property sold at sheriff's sale had formerly belonged, and that in conformity with such agreement, and by consent of plaintiff, there had been payment and settlement had as to said *pro rata* share of said insurance money claimed by Tumlin in his life, and his administrator since his death with J. M. Field. There was also filed a plea of settlement and accord and satisfaction, as to all the matters embraced in said suit, since the same was commenced between plaintiff and defendant, which was plead in bar to any recovery.

On the trial of the case, the jury returned a verdict for

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the plaintiff below, for the sum of twenty-two hundred and fifty dollars principal and fifteen hundred and seventy-five dollars interest.

The defendant below made a motion for a new trial on various grounds, as are set forth in the record, which was overruled by the court, and he excepted.

It is evident, from the evidence on the trial, that the verdict of the jury was a recovery alone on the item of "insurance money" collected by Tumlin. He had collected \$13,000.00 insurance, one-fourth of which plaintiff below claimed, which was \$3,250.00. One thousand of this amount Tumlin had paid, hence the verdict was for balance, \$2,250.00, with interest.

It is manifest that the jury believed from the evidence that since suit was brought there had been a settlement between the plaintiff and defendant, as to the proceeds of the sales of lands made by Tumlin to Borders and Poullain, and a payment in money by Tumlin to Fields, and a division of the notes given by Borders for his purchase of the land, between the parties, so as to leave wholly out of their consideration this item of the account sued on.

It appears from the record this suit had been pending for some time between the parties, and that by agreement the whole suit was referred for settlement and award to the respective counsel of plaintiff and defendant, with the right to choose an umpire; that various meetings were had, calculations made, and after several days, a result arrived at by the parties, which met their approval. It further appears that on the result reached, Tumlin paid Fields several thousand dollars in money, and that Borders, the purchaser of the last land sold, divided his notes held by Tumlin for said purchase, and executed them anew, giving to Fields his *pro rata* share of notes, and to Tumlin his proportion; that when this was done Tumlin demanded a receipt from Fields, which he declined giving, and as a reason alleged there might be a mistake.

It further appears that the referees made no written

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report or award, nor was any entry made on the dockets, but the suit continued pending for several years, without any action until Tumlin's death, when the same was pressed to a trial and verdict as here rendered.

I. It will thus appear that the main and important issue and plea relied upon by the defendant below was the settlement, and accord and satisfaction thereunder, which he plead in bar to this recovery, and the issue was whether there had been such settlement, accord and satisfaction as was claimed by defendant and denied by plaintiff. One of the grounds in the motion for new trial was error in the court's ruling out a portion of the answer of Borders to his interrogatories offered by defendant below on the trial. In the answer he made to the sixth direct interrogatory, he said, "The settlement testified about was in accordance to Field's figures, and all his figures showed to be due him was allowed him by Tumlin. [My understanding was that the above settlement was a complete settlement of the J. M. Field matter]," the portion in brackets was ruled out by the court.

In the third cross-interrogatory he was asked," if you testify as to any conclusion in reply to the sixth direct interrogatory, how do you know it?" He answered, "both parties said there was a conclusion arrived at, and so expressed themselves, and changed my notes."

With the light thrown on that portion of the answer to the sixth interrogatory (ruled out by the court) by the answer to the third cross-interrogatory, we are satisfied the court erred in ruling out the answer to the sixth direct interrogatory included in the brackets.

We are not prepared to say the words of the witness ruled out may not have been admissible even without the aid of the explanation, as offered in the answer to the third cross interrogatory, though we do not pass on this question. In 27 Ga., 207, this court said, "It was my understanding," when used by a witness, means ordinarily, "his knowledge and recollection of facts." See, also, 10

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Ga., 403; 17 Ib., 558. But aided and interpreted as these words excluded are, by the answer of the witness to the third cross-interrogatory, there can be no doubt as to their admissibility. Their effect and influence on the result we cannot measure or weigh. That was a matter for the jury, and being withheld from them, we think it was error.

2. Further, in looking through this record, we are not altogether satisfied with the verdict as rendered. It is very evident the jury based their verdict on the amount of the insurance money alone, claimed to be unpaid, and on this item alone was there a recovery had. The amount of insurance paid to Tumlin was \$13,000.00-to one-fourth of which plaintiff set up title, making the sum of \$3.250.00. Crediting this with the amount paid by Tumlin to I. M. Field by order of plaintiff, E. E. Field (\$1,000.00) and it leaves \$2,250.00, the principal of the verdict, and the interest corresponds with the interest on that sum from the date it was claimed to be due. It is very evident in this verdict the jury made no abatement on account of expenses, costs, etc., paid and incurred by Tumlin in collecting this insurance money, and the evidence is uncontradicted that he was at an expense (paid and incurred) of nearly one thousand dollars on this account. It was both legal and just that the plaintiff's proportion of this insurance fund should have borne its proportion of expenses. Moreover if, at the settlement claimed by Tumlin to have been had, the plaintiff repudiated any claim to his insurance money and renounced any title to it, as some of the testimony shows, and relying upon this, Tumlin paid him all the balance he claimed, and divided the notes for the purchase money, that fact might preclude him from any recovery under the circumstances, if the jury should so believe the testimony. If Field induced Tumlin to settle by his renunciation of title to this insurance money, he would be bound by his representation, which induced such action, and especially would this be so if Tumlin, relying on this renunciation of title of plaintiff, after-

wards, either in life or by his representative since his death, settled with J. M. Field according to the alleged agreement. Bigelow on Estoppel, 514.

If he submitted his suit to an arbitration in pais, and accepts the result of the award, he would be bound by his acceptance, and not be permitted to open the matter again. Bigelow on Estoppel, 515; 32 Ala., 480; 19 Pick., 300.

3. Further, in reviewing this record, we are not unmindful of the fact that the motion for a new trial was not passed upon by the judge who tried the case, and, therefore, it does not come to this court with that prestige in its favor as when pronounced upon by a judge who witnessed all the circumstances and surroundings of the trial before the jury.

In view of the whole facts in the record—the excluding from the jury the full answer of Borders to the sixth interrogatory in his depositions, and the further fact that Tumlin's estate is made to respond for the full amount of the *pro rata* share of this insurance money claimed by plaintiff, without regard to the cost and expenses incurred by Tumlin in collecting the same, and as this motion for a new trial was not passed upon by the judge who presided at said trial, we feel that the ends of justice will be best subserved by reversing the judgment of the court below, and ordering a new trial.

Judgment reversed.

# Wood et al. vs. The Macon and Brunswick Rail-

1. The sale of the Macon and Brunswick Railroad is valid and binding upon the state, and equity would hold the title good in the purchasers, though all the regulations prescribed for the manner of conducting it had not been literally complied with, if carried into execution substantially by the executive, the purchase money having been largely paid and the transaction virtually ratified by subsequent

- acquiescence of the legislative department. Under such circumstances, the case must be strong indeed to authorize judicial interference with the sale.
- 2. By the lease and subsequent purchase of the road and its franchises, the present company known as the Macon and Brunswick Railroad. Company acquired the right to extend and construct the road from Macon to Atlanta, subject to the limitations in the original and amended charters of the company, subsequent legislation thereon, and the constitutional guaranty to the owners of property not to force them to part with any portion of it without just compensation.
- 3. Though the state may previously have dedicated property along the direct line of said extension to other public uses, it has the reserved right to appropriate a necessary portion of it to other public use, provided such appropriation be made by express grant or necessary implication that such grant was intended; for having parted with it for one public use, in the absence of such new grant, the presumption would be that it had not made another inconsistent with the first.
- 4. If, therefore, the state herself had dedicated the ground embraced within the limits of the cemetery at Macon to the use of the public as a burying place for the dead, and the track of the proposed extension in the most direct line from Macon to Atlanta passed along the edge of the cemetery adjoining the Ocmulgee river, and was not inconsistent with the prior use of the ground for a cemetery, but passed over ground wholly unsuited to such use, the implication would be strong that the grant to construct the road on such direct line, not being in conflict with the prior dedication, included the grant to pass over such unnecessary part of the cemetery.
- 5. But where the city of Macon herself had dedicated the ground to the cemetery for herself, and by contract with the railroad company and for a valuable consideration had granted to the company the right of way through a portion of the former dedication not adapted to the former use and not interfering with any private lot conveyed by her to private persons, then it is clear that no such private person would be equitably entitled to interfere with the grant impliedly given by the state and expressly ceded by the city. This is especially so when such use will enure in the judgment of the city to the greater security of the former use and the general ornamentation of the cemetery. The particular improvement and adornment of his own lot is for the private judgment and taste of the owner; the general improvement and security and adornment of the entire grounds is for the city speaking through her authorities;



particularly when they speak, as is conceded, the overwhelming voice of the citizens.

- 6. Delay in applying for the writ of injunction until large expenditures have been made in acquiring the right of way on the line to the cemetery and in work done within it, and without notice to the company of any intention to make application therefor, will make equity more loth to stay the further progress of the work. The writ is designed to prevent, not to undo; and without strong reason therefor, if delayed until progress at heavy cost has been made, the application should not be granted.
- 7. Facts in dispute, with conflicting affidavits, are for the chancellor, and unless his judgment thereon shows an abuse of discretion, this court does not interfere. In this case his judgment thereon is overwhelmingly sustained.

Equity. Injunction. State. Railroads. Sales. Corporations. Cemeteries. Municipal Corporations. Eminent Domain. Before Judge SIMMONS. Bibb County. At Chambers. December 10th, 1881.

This bill was filed by Wood et al. against the Macon and Brunswick Railroad Company, the East Tennessee, Virginia and Georgia Railroad Company, and against the Mayor and Council of the city of Macon, alleging an agreement between the Macon and Brunswick Railroad Company and the city of Macon to run the line of said railroad company through Rose Hill Cemetery and the grounds thereof, which had long before been dedicated by the city of Macon to the exclusive use of the public and the citizens of Macon as a cemetery or burial ground, on the faith of which dedication and long use thereof for that purpose, the complainants or their ancestors had bought burial lots in said cemetery grounds, contiguous to the said contemplated line of railway as intended to be run, had built costly and expensive monuments on them and buried their dead in the same; that the cutting of said railway through said grounds would injure and damage the lots of complainants and monuments erected on the

same seriously, would greatly mar and injure the grounds as a burial place, and would be violative and destructive of the right of complainants as lot owners and persons interested in said cemetery as stated, and they ask an injunction against the consummation of this agreement or the construction of this line of railway through these burial grounds.

The bill of exceptions states that the bill was handed to the chancellor on October 5th, 1881. On October 11th, 1881, he passed an order requiring defendants to show cause why injunction should not be granted, returnable October 22d, 1881, and in the meantime a restraining order was granted to prevent trespassing on the grave of Wood, the father of some of complainants. Service was entered on the bill by the sheriff by having served J. M. Edwards, superintendent and agent of the Macon and Brunswick Railroad and as agent of the East Tennessee, Virginia and Georgia Railroad, personally, and also by serving J. K. Brice, "agent as above set forth," by leaving a copy at the place of transacting the usual business of the companies. The ease was postponed from time to time until December 10th, when it was heard.

The Macon and Brunswick Railroad Company answered this bill, denying that the construction would injure the rights of complainants-their property, or that it would detract from the usefulness or beauty of the grounds as a cemetery, but would add to its attractions and be an ornament to it as well as useful; that complainants and other lot owners had no title to the fee or any other right except the right of burial of their dead on the grounds conveyed for that purpose; that the defendant, the Macon and Brunswick Railroad Company, was constructing its road through said grounds, along the bank of the Ocmulgee river, and appropriating said ground to that purpose and use by authority of law contained in the grant of the legislature authorizing the extension of that road by its lessees from the city of Macon to the city of Atlanta, on the line of which contem-

plated and authorized extension lay this cemetery. the construction of the road would not damage complainants, as it would not run through any of their lots, but along the river bank on unoccupied ground. Also that the ordinance on which the agreement between the city and the railroad was based had been passed on August 14th. 1881, and the contract was signed October 27th, 1881, That relying on this ordinance, which had been made public through the press and otherwise, the railroad had gone to large expense in purchasing a right of way on each side of the cemetery, and preparing to run their road along this line. That complainants must have known of these facts, but made no objection, nor did the company have any knowledge of the application for injunction until October 15th. Since that time it has proceeded regularly with its work.

The complainants replied that the persons constructing said railroad were not the lessees of the Macon and Brunswick Railroad, nor their associates, nor had they the legal right to use and control said charter for such purpose; in other words that they had no title or legal right to said charter to make said extension or to appropriate said grounds to such use; and if they were, the legislature had not authorized them to take and appropriate property for this use that had already been dedicated to another public use, nor was the right necessarily implied in the grant to construct and use a railroad between the two points named.

It was insisted that the terms of the act of September 3d, 1879, authorizing the lease or sale of the Macon and Brunswick Railroad had not been complied with, and that, therefore, the present holders of the road did not have the charter powers of the Macon and Brunswick Railroad Company.

Complainants also replied, as to the plea of progress in the construction and outlay of money and labor in the enterprise, in avoidance of the interference by the court now, that the application for injunction was made in time, and that

defendants got notice of the application to the chancellor, and with a full knowledge of its tendency, made extraordinary and unnecessary speed in their work—on this particular part of the work—in order to thwart and frustrate the action of the courts thereby; and that this, therefore, having been done with their eyes open as to the intention of complainants, and to obtain that advantage, was of no avail.

The other defendants, except the East Tennessee, Virginia and Georgia Railroad, as well as the Macon and Brunswick Railroad, answered, denying the allegation in the bill and amendments. But the answer of that defendant contains all that is necessary to an understanding of the points decided. Some point was also made in regard to the service on the East Tennessee, Virginia and Georgia Railroad, but it is immaterial here. Numerous and conflicting affidavits were introduced in support of the bill and answers, which it is unnecessary to set out in detail. The chancellor refused the injunction, and complainants excepted.

LYON & GRESHAM; H. F. STROHECKER, for plaintiff in error.

BACON & RUTHERFORD; HILL & HARRIS, for defendants.

JACKSON, Chief Justice.

The powers of chancery are invoked in this case to enjoin the Macon and Brunswick Railroad Company, in the hands of its present management, from extending its track from Macon to Atlanta through Rose Hill cemetery, in the former city. The injunction was denied by the chancellor, and complainants, who are private owners of certain lots in the cemetery, except to that judgment and assign it for error in this court.

1. They say that the present company have no title to

the road because the governor did not comply with the terms of sale prescribed by the general assembly, and therefore that the injunction should have been granted.

Substantially we think that the terms were complied with, and if they were not in mere particulars, not of vital consequence, that fact would not operate to render void the sale, at the instance of private parties especially, so as to prohibit the company from going on with the road, the state not interposing at all, but having received part of the purchase money, and being equitably bound to refund it before she herself could well set the sale aside.

She has virtually acquiesced in it, not only by the acts of the governor, but of subsequent legislatures.

2. We think, therefore, that it is beyond doubt that the present company, by virtue of the lease and subsequent purchase of the road from the state, have title thereto, and have acquired the right to construct or extend the road from Macon to Atlanta, according to the original and amended charter and subsequent acts of the general assembly. The main purpose of the legislature, it seems to us, was a competitive line with the Central Railroad from Macon to Savannah and from Atlanta to Macon. and the extension was in the legislative mind all along their action on the lease and sale authorized by them. To say that the lessees who afterwards purchased under the act of the general assembly did not acquire the right to extend the road, would be to defeat the main current of the legislative will, and divert it from the course in which the legislature designed the whole legislative action to flow. Of course, this right to construct the road is subject to all the limitations which the constitution and laws affix to all grants of such franchises, and private and municipal rights must all be respected by the company as they progress in the work. If, therefore, the citizens of Macon and owners of lots in her cemetery have rights which in equity and good conscience inhere in them by virtue of the constitution and laws, and if this company

seeks to violate them and is about to do so, equity would intervene, if no other remedy appeared, even to the harsh extent of arresting a great work of internal improvement or diverting the course of that work. The question in this case, therefore, is, are there equitable rights in these complainants, and are those rights so jeopardized by the action of this company in passing through the cemetery as to require the remedy by injunction.

3. What are the rights of complainants? They allege that they own lots in the cemetery, and that the passing of this road through the cemetery does not consist with their use of the lots for the purposes of burial; that the land over which this road now seeks to pass was dedicated to the public for those purposes of burial; and that the generally assembly could not, and did not in fact, mean to annul the prior dedication.

We think it clearly established by our own adjudications, without reference to other authorities, that the state, though it may have dedicated property to one public use, by the exercise of its right of eminent domain, has the power to dedicate a portion of the same property to another public use, not inconsistent with and destructive to the first use. The doctrine has been applied to country roads and streets, where grants to railway companies to use portions of such public ways have been upheld, especially with the consent of the public authorities, over the particular ways, and without regard to objection of private persons. 43 Ga., 201; 44 Ib., 547; 45 Ib., 602; 50 Ib., 451.

4. The point then becomes this question: even conceding that the state had dedicated this ground for a cemetery, has it authorized the use of it for another great public object? That must clearly appear either by express grant or by necessary implication; because the presumption would be that if she had granted all of it for one public use, she would not make another grant inconsistent with the first. She has granted the right to run the

road directly from Macon to Atlanta-to extend it from the former to the latter place. So, to extend it, it must pass through the city of Macon, because its present terminus is on the side of Macon farthest off from Atlanta, and the direct line contemplated would pass along the bed of the Ocmulgee river, that being the most direct and convenient route. The proof before the chancellor satisfied him, and the depositions in the record sustain his judgment beyond doubt, that the latter grant is not at all inconsistent with the prior grant, if there had been one. The road runs along the river, close to it, and on ground not capable of being used for the burial of the dead, and when built it will operate as a sort of breakwater, and not detract from the beauty of the cemetery. Such is the testimony—the decided weight of it,—and our rule is unvaried, never to interfere with the chancellor on a matter of fact, if there be evidence enough to sustain his ruling thereon.

5. But it seems that the city has assented to this act of the company, and not only so, but that she made the dedication herself. The state gave the common to her, and she dedicated this part of it for burial purposes. She now consents to the use of a part of it by the road, in her judgment unimportant for the former use; she contracts for a consideration that the company may use such unimportant part, and private persons seek to defeat her action and annul her contract.

We cannot see that their particular lots are in any wise injured by the contract. The general government and ornamentation of the cemetery is for the city. She may not injure the private property of any lot owner therein, but it is for her to lay off avenues and cut down or plant trees and shrubbery for the general beauty of the whole, and to adopt measures for its security; and it will not do to hold that two or three, or a hundred, lot owners have the right to appeal to the courts and stop her in such preservation and ornamentation.

In this case but very few, three I think, of the lot owners are complaining, while the action of the city authorities is sustained by the overwhelming voice of the citizens. So that the effort to set up equitable rights in such a case as the facts here make must fail, no matter whether the doctrine in regard to the power of the state, if she had dedicated the particular ground for the cemetery, be right or wrong.

6. It seems, too, that these complainants are too slow to be permitted to set up equitable abstract rights, even if they ever possessed them.

The contract between the city and company had been long made; the line towards the cemetery laid off; money expended thereon in rights of way and other purposes; the road-bed actually laid or graded on a portion of it, before complaint was made.

The principle that to the vigilant, and not to the sleepy, equity opens her portals is applicable here, and applies with sufficient force always to close her doors when by reason of that sleep the adverse party has expended money and labor, thinking that nobody interested would oppose the right to complete what had been commenced in the confidence which non-action by everybody interested had engendered.

7. As before stated, facts, when in dispute are for the discretion and judgment of the chancellor, and the face of this court is set like flint, and has been time out of mind, against interference therewith, unless grossly abused. In this case there is no abuse, but the judgment on facts and law was demanded and must be affirmed.

Judgment affirmed.

Cited for plaintiffs in error: 6 How. R., 507; 7 Ib., 185; Pierce on Railroads, 154-5-6; 21 Am. R., 643; 57 Ill., 363; 43 Conn., 234; 53 N. Y., 575; 20 Hun, 201; 12 Ga., 239; 43 Conn., 234; 33 Ga., 601; 47 Ib., 565; 49 Ib., 476; Code, §2223; High on Inj., 139, 140, and note; 12 Ga.,

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239; 48 *Ib.*, 44; 29 La., 38; Acts of 1878-9 p. 115; 16 Wall., 203; 9 Wheat., 738; 14 Pet., 497; 12 *Ib.*, 524; 101 U. S., 601; 2 Dill. on Mun. Corps., 3d Ed., 914 et seq.

For defendants: Acts 1878-9, p. 115; Fort's Comp., p. 53; 8 Ga., 228; 17 Ib., 29; 20 Ib., 797, 802; 46 Ib., 350; Code, §\$2360-61; 5 Ga., 22: 6 Ib., 458; 25 Ib., 374; Field on Corp., 71; Fort's Comp., pp. 21, 50, 53; 43 Ga., 200; 44 Ib., 547; 45 Ib., 602; 51 Ib., 451; 23 Ohio, 510; 6 How., 507; 13 Ib., 71; 17 Conn., 196; 3 Bland (Md.), 442; 24 Iowa, 455; 8 Dana, 289; 14 Gray, 93; 10 Min., 82; 31 Md., 180; 10 N. J. Eq., 352; 36 Penn., 99; 7 Ind., 479; 18 Barb., 222; 3 Head; 596; 22 Vt., 458; 33 Mo., 128; 25 N. Y., 526; 1 Redf. on R. R's, 268; Const., 1877, Sup. to Code, 575; 39 Md., 631; 66 Penn., 411; 42 Ib, 132; 46 N. Y., 503; 5 Am., 377; Acts, 1835, p. 226; 50 Ga., 451; Code, §\$2997-8, 4094; 59 Ga., 190; 54 Ib., 29; 13 Barb., 646; Acts of 1847, p. 36; and Record, pp. 5 and 7.

### WILSON vs. ROGERS et al.

- A homestead is in the nature of a trust estate, and if it be sought to subject it by suit, the pleadings should show the grounds therefor, and the names of the cestus que trusti.
- (a.) A plaintiff seeking to subject a homestead set out his grounds therefor, in that he sued for certain described work thereon, and alleged the wife to be the beneficiary of the homestead; the suit was against the husband and his wife. They pleaded to the merits, a judgment was had for the plaintiff before a justice, an appeal was taken, and a verdict found for the plaintiff. After levy of the fi. faissued thereunder, an affidavit of illegality was filed on the ground that the petition did not fully set forth the grounds of the liability of the homestead estate or the names of the cestui que trusts:

Held, that the affidavit was properly dismissed on motion.

Homestead. Pleadings. Judgments. Before Judge LAWSON. Morgan Superior Court. September Term, 1881.

Wilson vs. Rogers et al.

Reported in the decision.

J. H. HOLLAND, by brief, for plaintiff in error.

No appearance for defendant.

CRAWFORD, Justice.

The defendant in error sued Stephen and Nancy Wilson upon an open account for work and labor done and performed on the homestead estate of the said parties, amounting to the sum of \$50.55.

The petition set out the specific work done and each item thereof in a bill of particulars attached. The defendants pleaded the general issue and a set-off. The justice of the peace before whom the case was tried gave judgment for the plaintiff in the sum sued for. An appeal was taken to the superior court, and upon the trial a verdict and judgment were rendered for the plaintiff, from which a fi. fa. was issued and levied upon the property specified therein.

The levy having been made, Nancy Wilson filed her affidavit of illegality to the execution upon the ground that the suit, the foundation of the execution, failed to set forth the grounds of said claim, and how and in what manner the said estate was liable, and because the names of the cestui que trusts were not set forth as required by law.

The affidavit of illegality was dismissed and the fi. fa. ordered to proceed; this judgment of the court below is assigned as error.

The homestead estate being set apart for the use and benefit of the family, is in the nature of a trust estate, and when it is sought to subject the same to the payment of any claim for which it may be liable, the party must file his petition setting forth the grounds of his claim, how and in what manner the estate is liable, and the names of the cestui que trusts.

Vork vs. The State.

In this case the grounds of the claim are set forth—the particular work done and labor performed on the homestead land, together with the name of Mrs. Nancy Wilson as the cestui que trust. The defendants appeared and pleaded to the merits, making no objection to the petition on either of the grounds taken in the affidavit, and after one verdict, two judgments and a levy, then comes the affidavit of illegality, which can not, under the facts of this case, reach behind the judgment and stop the execution. The more especially is this so when the proceedings are in direct pursuance of law, and the legal presumption being that there was no other cestui que trust than the said Mrs. Wilson who was named as such, unless that fact was made to appear otherwise.

We think that the ruling of the judge was right, and the same is therefore affirmed.

Judgment affirmed.

## YORK vs. THE STATE OF GEORGIA.

- Two things are necessary to make up the statutory offence of bastardy: that the defendant is the father of the bastard, and that he has refused to give bond for its maintenance and support when required in terms of the law.
- 2. Where a warrant was issued against the putative father of a bastard, and before the justice he waived a preliminary hearing and gave bond to appear at the next superior court, which was allowed by the justice, such facts, without more, did not amount to a demand and refusal to give bond for the maintenance and support of the bastard.
- If such demand and refusal in fact occurred, the defendant cannot relieve himself by offering to give bond in the superior court.
- (a.) Has any magistrate except a justice of the peace authority to take such a bond? Quare.

Criminal Law. Charge of Court. Before Judge WELL-BORN. White Superior Court. October Term, 1881.

Reported in the decision.

#### York vs. The State.

M. G. BOYD; A. F. UNDERWOOD & SON; J. J. KIMSEY, by HARRISON & PEEPLES, for plaintiff in error.

W. S. ERWIN, solicitor general, by F. L. HARALSON, for the state.

CRAWFORD, Justice.

William V. York was indicted under the bastardy act, and upon his trial before the superior court was found guilty. He moved for a new trial upon the several grounds set out in his motion, but the same was refused, and he assigns said refusal as error.

The controlling question in the case arises upon the view taken by the court below of the law, as to the manner in which the defendant made himself liable to indictment and punishment. It appears that the defendant, when arrested and carried before the justice of the peace waived examination, and entered into bond to appear and answer the charge before the superior court. What else, if anything, transpired before the justice at the time does not appear.

Upon the trial in the superior court, the judge charged the jury that, "When a warrant is issued directing the arrest of any person charged with being the putative father of a bastard child, predicated upon a proper affidavit, and the person is arrested by a proper officer by virtue of such warrant, the warrant in itself is a demand for security to the county against loss on account of said bastard child, and the demand is upon the person charged in the warrant." The warrant was for arrest and appearance before the justice of the peace to answer the charge, it had no other force or effect, and to have given it more was error. It was in no sense a demand upon the defendant for security; the matter of demand for security and the refusal to give it was for the judgment of the justice at the inquiry.

As has been held several times by this court, two things

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only are necessary to be established to complete this offence, one is that the defendant is the father of the bastard child, and the other that he refuses or fails to give the bond for the support and maintenance of the child when required to do so in terms of the law.

This case therefore must be remanded for a new trial, and upon which to warrant a conviction, sufficient testimony should be produced to show that the defendant refused or failed to give the bond and security when brought before the justice of the peace and required to do so in terms of the law. It is wholly immaterial for what reason he may have failed or refused to give it, but it must appear that he did so fail or refuse to give it, before he can be found guilty of the offence charged. And this, because the offence is not complete without such refusal, and when complete nothing short of punishment can be a satisfaction.

Neither can the defendant on the trial in the superior court escape it, by then offering to give the bond. Indeed it was doubted by Justice Benning whether under any circumstances any magistrate but a justice of the peace has the authority to take a bond of this kind. 23 Ga., 230-34.

We are not to be understood as holding, that the refusal to give a bond can be proved only by the refusal in so many words, but by what transpired at the time of the inquiry before the justice, if the same is sufficient to satisfy the jury of such refusal or failure, when required by the justice in terms of the law to do so. This being one of the necessary facts which must exist to establish the guilt of the accused, it is a question for the jury and not for the court. His power touching facts goes to the extent only of determining whether the verdict is based on sufficient evidence to support it.

Judgment reversed.

Allen et al., by next friend, vs. Cravens et al.

# ALLEN et al., by next friend, vs. CRAVENS et al.

- On exception to a judgment of the court below all necessary parties, not merely nominal, must be served.
- (a.) A bill having been filed by cestui qui trusts to annul a contract and set aside a deed made by their trustee to a third party the trustee was a necessary party, and on exception to a finding in favor of the defendants, the trustee was a necessary party to the bill of exceptions, and should have been served.
- 2. Where the record showed that there were more defendants than one, represented by different counsel, and service of the bill of exceptions was acknowledged by counsel who had appeared for one of them, "for the defendant," it did not amount to service except as to the one defendant. 59 Ga., 666.

Practice in Supreme Court. Before Judge FAIN. Catoosa Superior Court. August Term, 1881.

Reported in the decision.

JAS. H. ANDERSON; McCutchen & Shumate; E.D. Graham, for plaintiffs in error.

R. J. McCAMY, for defendants.

JACKSON, Chief Justice.

This is a bill filed by complainants against J. R. Cravens, Caleb Fuqua and R. W. Allen. The complainants are the children of Allen, suing him as their trustee and the other defendants, and the intent and prayer of the bill is to annul a contract made between Cravens and Allen, the trustee, and to set aside a deed made by Allen to Cravens to a certain tract of land belonging to the trust estate.

A motion was made to dismiss the writ of error on the ground that Allen, one of the defendants, was not served with the bill of exceptions. The point was reserved and the entire case heard; but on a careful review of the bill of

## Allen et al.. by next friend, ve Craven et al.

exceptions and transcript of the record, we find it absolutely necessary to adjudicate the question whether Allen, the trustee, is a necessary party, and not such a mere nominal party as need not be served under the act of 1881. See section 5 of that act, in laws of 1881, p. 123. The verdict is for all the defendants, for Allen as well as the others.

Therefore, as Allen is not a party to this bill of exceptions, the verdict will stand as to him, though a reversal · and new trial be ordered here, and when the case is sent back and comes up for trial again below, it cannot be tried again so far as he is concerned, for he already has a final, unreversed verdict and judgment or decree in his favor. Can it be tried again without him? Clearly it can not, because the very issue is his contract—was it legal or And the prayer is to set it aside as illegal. Moreover, his deed to the land is the deed which the prayer asks the court to annul. We do not see, therefore, how the case can be tried at all without him as a party; and if it can not be tried without him, and he can not be made again a party in consequence of the former final verdict and decree, a reversal of the decree and the order for a new trial would be a mere vain, unproductive thing, which a court will never do.

It follows that Allen, the trustee, is a necessary party, and should have been served.

2. Was he served? The service must appear on the bill of exceptions. 59 Ga., 666. Acknowledgment of service for defendant (in the singular) will embrace but one. 57 Ga., 197.

In the case now before us, the record shows for whom
—for which of these defendants—service was acknowledged
by the counsel who made it; because he answers for that
defendant, and Allen, the trustee, appears and answers by
other counsel. McCamy, the counsel who makes the
acknowledgment, had no power or authority to acknowledge for Allen, and it is clear that he was not served by

the acknowledgment of McCamy, nor is there any other service or acknowledgment of service, as respects Allen, anywhere on the bill of exceptions.

Allen being a necessary party, and not nominal in the sense of the act of 1881, that act does not cure the failure to serve him, and the writ of error must be dismissed.

# HILL, administrator, vs. SHEIBLEY.

Where one received money from another to be invested on their joint account in purchasing real estate, and in case they made no investment, to be returned, a fiduciary debt was not thereby created, so as to avoid the operation of the bankrupt act of 1867.

(a.) Such facts did not create the party receiving the money a trustee or agent, but a partner; and hence are not covered by the cases touching agents.

Bankruptcy. Contracts. Partnership. Principal and Agent. Fiduciary Debts. Before Judge UNDERWOOD. Floyd Superior Court. September Term, 1881.

Hill, as the administrator of Joseph A. Davis, brought suit against Sheibley on the following receipt given by Sheibley to Davis:

"Received, Rome, August 13, 1866, of Dr. Joseph A. Davis, five hundred dollars to be appropriated on joint account to buying property in the city of Rome; in case of no investment to be returned,

(Signed)

P. M. SHEIBLEY."

On the trial, the jury found for the plaintiff. The defendant moved for a new trial, on the following among other grounds:

- (1.) Because the verdict is contrary to law and evidence.
- (2.) Because the defendant was discharged from the debt sued on by his discharge in bankruptcy; and said verdict was contrary to and in conflict with the 4th paragraph, 8th section, article I of the constitution of

the United States, by which it is provided that congress shall have power to establish uniform laws on the subject of bankruptcy throughout the United States; and contrary to the act of Congress and the amendments thereto establishing a uniform sytem of bankruptcy throughout the United States, passed on the 2d day of March, 1867, and the several bankrupt acts and amendments thereafter passed, and all of which were passed in pursuance of said provision in said constitution; and contrary to the evidence and amended plea of defendant filed on the 12th day of April, 1881.

- (3.) Because the verdict is contrary to the following charge of the court: "Where the question of fraud is made in any case, the burden of proof is on the party alleging the fraud, and in a case like this there must be proof of positive fraud involving moral turpitude; proof of implied fraud will not do; proof that the defendant received the money to be appropriated on joint account to buying property in Rome, and that he did not so invest it, and his failure to pay it back, does not make a case of actual or positive fraud, and does not bring the debt within the operation of the exception named in the statute on the subject of fraud."
- (4) Because the verdict is contrary to the following charge of the court: "If the money was received by the defendant to be appropriated on joint account to buying property in Rome, and if no investment was made, and the money was not paid back, this would not make the debt one created by defendant while acting in a fiduciary character, and the defendant is discharged from it by his discharge in bankruptcy."

The plaintiff contended that money was held by Davis in a fiduciary capacity, and, therefore, that it was not within the provision of the bankrupt act of March 2d, 1867.

There was much conflicting testimony, which it is not necessary to set out.

The court granted the motion for a new trial, and the plaintiff excepted on the following grounds:

- (1.) Because the court erred in granting a new trial on all of the grounds stated in the motion for a new trial.
- (2.) That the court erred in granting a new trial in said case upon the ground that the debt sued on is discharged by the discharge of the defendant in bankruptcy.

DABNEY & FOUCHE; J. BRANHAM, for plaintiff in error.

A. R. WRIGHT; C. N. FEATHERSTON, for defendant.

JACKSON, Chief Justice.

When this case was last here—64 Ga., 529—the legal effect of the defendant's discharge in bankruptcy was not positively ruled as to this debt; the decision rested then on another controlling point, rendering it unnecessary to decide this, though it was alluded to in the opinion. On the trial now for review, the court below put its grant of a new trial specifically on the point that the defendant's discharge in bankruptcy operated to discharge his liability on this receipt or note, it not being "fiduciary" in the sense of that term as employed in the bankrupt act of 1867, so that the decision of the question is imperative It was postponed then in the expectation that the supreme court of the United States would make such a ruling as would control it and the like points in similar cases, but no case has been decided by that court which throws more light on the point than that in 5th Otto, 704. alluded to in the 64th Ga., in this case.

This court has gone to the extent of holding that an auctioneer, a commission-merchant and an executor, in the use of funds, goods, etc., entrusted to them are fiduciary agents, and debts due from these classes of trustees are fiduciary debts. 44 Ga., 460; 54 Ib., 125; 60 Ib., 523.

We adhere to the judgments thereon made, and shall apply the principle to all cases of kindred character, until we are clearly satisfied that the supreme court of the United States holds adversely to our view. We cannot, however, shut our eyes to the fact that the current of authority in the federal and state courts runs counter to the view this court has taken, and, therefore, it would be unwise in this court to extend the principle beyond the class of cases within those enumerated above, or clearly analagous to them.

Those cases cover agents whose general business is to deal with the property of others, entrusted to them for that purpose, and it still appears to us that they are, from the very nature of their employment, trustees, and the debts contracted by them or owing by them from their business, and the confidence placed in them in that business, are fiduciary, and were contracted in that capacity.

But this case comes within neither of the classes ruled by this court as within the exceptions of the 33d section of the bankrupt act of 1867. The defendant was to apply the money to his own use in part. It is in effect a case where one man entrusted to another money for a joint or partnership speculation in real estate in Rome, and the debt sued on is owing for that money. To extend the principle to this case would be to extend it to every case of partnership where one put in money and the other skill and labor, and indeed to every case of partnership where one partner got hold of the contribution of the other, and misapplied it.

We cannot say, then, that the court erred in ruling that this debt is not fiduciary in the meaning of the act. As to fraud, there is no more fraud here than in all cases where a man gets another's money or property into his possession, and, misapplying it, fails to repay it when it is demanded. This point in this case seems to be directly within the ruling in 5th Otto, 704.

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So that our conclusion is that the court below was right in granting the new trial, and the judgment is affirmed.

Cited for plaintiff in error: Rev. Stat., U. S., 5117; 8th Ed. Bump's Bank., 722; 15 Ill., 547; 13 Otto, 103; 10 R. I., 261; 42 Texas, 1; 44 Ga., 460; 54 Ib., 125; 60 Ib., 533; Gilreath & Son vs. Holston Salt and Plaster Co., Sept. Term, 1881.

For defendant: 57 Ga., 232; 64 Ib., 529; 44 Ib., 460; 54 Ib., 125; 60 Ib., 523; 49 Ib., 127; 56 Ib., 570; 35 Ib., 268; 56 Ib., 185; 49 Ib., 602; 43 Ib., 354; Bump (6 Ed.,) 520; 104 Mass., 245; 49 N. H., 312, 518; 5 Otto, 704; 5 Bissel, 324; Code, §§3480, 4424, 559, notes.

## COTHRAN, trustee, vs. FORSYTH, administrator.

- 1. Hearsay evidence is not admissible.
- (a.) It is not competent to prove by a witness what was the intention of another person, without giving any facts as a basis for such conclusion.
- 2. In a claim case, the claimant admitted possession in the defendant in f. fa. after judgment, and assumed the onus. He was a witness in his own behalf. At the close of his testimony, his counsel announced their case closed. After consultation, counsel for plaintiff in fa. fa. announced that they would introduce no testimony, but desired to recall the plaintiff for a moment to ask some questions which they had omitted. The court replied "very well;" claimant's counsel said nothing. The witness again took the stand, and was examined by counsel for both parties:
- Held, that such matters rest in the discretion of the court. Upon his recall, the claimant was still a witness in his own behalf, and plaintiff in f. fa. did not thereby lose the right to open and conclude the argument.

CRAWFORD, J., dissented.

- 3. A voluntary deed made by a debtor while insolvent is void against his creditors; or any deed made by a debtor with the intention of delaying, hindering or defrauding creditors, such intention being known to the party taking, is void.
- 4. Where, in a claim case, the claimant assumed the onus probandi,



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and the defendant in f. fa. was shown to have been considerably in debt at the time of making a voluntary conveyance on which the claim rested, the burden was upon the claimant to show that the transaction was valid, including ample solvency at the time of the making of the deed.

5. The verdict was supported by the evidence.

Evidence. Claims. Practice in Superior Court. Debtor and Creditor. Deeds. Fraud. Insolvency. Before Judge BROWN. Floyd Superior Court. March Term, 1881.

A fi. fa. issued from Floyd Superior Court in favor of Daniel R. Mitchell against Wade S. Cothran, Hugh D. Cothran and James M. Elliott, doing business under the firm name of Cothrans & Elliott, was levied on a lot in the city of Rome as the property of the said Cothrans; a claim was interposed by Hugh D. Cothran, as trustee for his wife and children. Plaintiff in fi. fa. having died, his administrator, Forsyth, was made a party. Claimant's title to the land in dispute was by virtue of a deed of gift made August 11th, 1866, by Hugh D. Cothran to himself as trustee for his wife and children. Plaintiff in fi. fa. contended that the deed was void on the ground that claimant was insolvent at the time it was made. Much conflicting evidence was introduced, which it is unnecessary to set out at length. The jury found the property subject. Claimant moved for a new trial upon the following among other grounds:

(1.) When the case was called for trial and after the jury had been stricken, counsel for claimant admitted in writing that H. D. Cothran was in possession of the property levied on after the date of the judgment, and also admitted orally, and so argued to the court, that the debt upon which the plaintiff's judgment was founded was contracted prior to the execution of the trust deed, under which claimant held, and that the onus to show the solvency of H. D. Cothran at the time said deed was made was on the claimant.

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Thereupon, after argument had, the court held that the claimant's counsel were entitled to open and conclude the case. Claimant's counsel then introduced his deeds and other evidence in the case, concluding his testimony with the examination of H. D. Cothran as a witness for claimant. Plaintiff's counsel cross-examined the said H. D. Cothran and announced that they were through with said cross-examination. Said witness was then called down from the stand by claimant's counsel and the said counsel announced to the court that they had closed for the present, and the court ordered the counsel for plaintiff to proceed with their evidence. The plaintiff's counsel, after a conference among themselves, said to the court: will introduce no evidence: we desire to recall Capt. Cothran for a moment to ask him some questions which we have omitted." The court replied, "Very well." Claimant's counsel made no reply, and thereupon said Cothran was requested to take the stand, and he was examined by said counsel in reference to 224 bales of cotton bought in Eufaula in December, 1865, and January, 1866, and all the evidence in relation thereto and succeeding this part of the testimony was brought out, most of which is set out in the motion.

When the evidence had been concluded, claimant's counsel submitted to the court that they were entitled to make the concluding argument in the case, and moved the court to allow them the concluding argument; but the court overruled their motion, and awarded the concluding argument to plaintiff's counsel.

(2.) Because the court, on motion of plaintiff's counsel, ruled out so much of the following evidence as related to the intentions of W. S. Cothran, to wit: Q "I ask you, in reference to this Eufaula cotton, if your father was not to carry that whole loss, so far as you were concerned?" A. "Do you mean whether he intended to make me pay it?" Q. "Yes, sir." A. "Well, he intended to carry it;

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I don't know whether he intended to give it to me; he intended to carry it for me if there had been a loss." Q. "What do you mean by intending to carry it; do you mean that he intended to pay it for you?" A. "Yes, sir."

Plaintiff's cousel objected to his intention, and the court sustained the objection.

Witness stated: "I supposed that he would have been as clever to me as to Capt. Elliott. He gave Capt. Elliott his, as Capt. E. said."

Plaintiff's counsel objected to this also, and the court sustained the objection.

- (3) Because the court refused to give the following charge as requested: "If H. D. Cothran was solvent at the time he made the deed to his wife and children, or to himself in trust for them, then the deed is valid;" but on the contrary charged as follows: "If H. D. Cothran was solvent at the time he made the deed to his wife and children, or to himself as trustee for them—that is to say, if he had ample means outside of the property so conveyed, to pay all the debts he then owed, and the deed was made in good faith, and with no intention to defraud his creditors—then the deed is a valid one."
- (4.) Because the court charged the jury as follows: "I have been asked to charge you by plaintiff's counsel that the presumption is, when a man gives away his property when he is in debt, and his creditors are defeated, that he intended to do it, and the burden of proof is upon him to show good faith. If he was shown to be considerably in debt at the time he gave away the property, then the burden is upon him to show that it was a valid and legal transaction; not only that he was solvent, but that it was not done with any intention to defraud his creditors. He must show that he was amply solvent at the time he made the deed."
  - (5.) Because the verdict is contrary to law and evidence.

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The court overruled the motion, and the claimant excepted.

DABNEY & FOUCHE; J. BRANHAM, for plaintiff in error.

A. R. WRIGHT; C. N. FEATHERSTON, for defendant.

JACKSON, Chief Justice.

The motion for a new trial in this case is based on three grounds: First, that the claimant was not permitted to conclude the argument; secondly, that the court gave erroneous charges to the jury; and thirdly, that certain evidence was rejected.

- 1. There was no error in rejecting the evidence. Part of it was objectionable, being the hearsay of another person, not a party, and the rest objectionable because it was the witness' sayso about the intention of his father, without giving any facts to show that intention.
- 2. There was no error in awarding the conclusion of the argument to the plaintiff in execution. Under the facts, it was in the discretion of the court to permit the plaintiff in execution to interrogate further the claimant who had offered as a witness for himself, and not to consider him when re-interrogated by request the witness of the plaintiff. So far from that discretion having been abused in this case, under the facts here disclosed, it would have been abused if the court had made him the witness of the plaintiff. The facts are that the witness, being the claimant himself, had been examined and cross-examined, and was called down from the stand, and claimant closed for the present. The plaintiff's counsel, after conference among themselves, then said to the court; "We will introduce no evidence, we desire to recall Captain Cothran (the claimant) for a moment to ask him some questions which we have omitted." The court replied, "Very well." Claimant's counsel made no reply, and thereupon the claimant was recalled, and the questions asked without

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objection of any sort by the claimant on the witness stand or his counsel.

These facts make it too plain, it seems to us, for serious question that when the claimant was recalled to be asked omitted questions, by leave of the court and without objection by his own counsel or himself, at the very moment that the plaintiff announced "we will introduce no evidence," that he was recalled as his own witness still. plaintiff had the right to put him up as his, the plaintiff's, witness without any leave from the court, or acquiescence from the claimant. If he had intended to offer his adversary as his witness, he would not have asked the leave to recall him, nor would he have said at the very time he asked leave to recall him, "we will introduce no evidence." What sort of child's play, what nonsense to say, "we will introduce no evidence," and straightway to introduce it! It is clear, therefore, that plaintiff did not intend claimant when recalled to be his witness. The very language, to recall, indicated to have him again on the stand as he was before he left it. The very leave he asked, the announcement he made when he asked it, all show his, the plaintiff's, intention.

How was it with the claimant? Why did he not object, if he intended to regard the witness as plaintiff's witness, when he knew that his adversary regarded him as his own? Is it fair that he shall sit silent and acquiesce in the leave to recall, and then claim himself to be the witness of the adversary when recalled? Nay, more, shall he go on and participate in the renewed examination of himself, and thus, by acts as well as silence, approve of the leave of the court to the recall, and afterwards claim "I am the witness of the other side and not my own"? Does not fair dealing estop him from setting up such a claim? Will any court tolerate such ambushing? Justice always stands in an open field, and should not permit fighting under cover by any of the combatants in her tournaments. Batteries may play as rapidly and powerfully as brain and

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tongue can pour out canister and grape, but they must unmask when Justice watches the contest in order to crown the victor in a fair fight.

Yet, in this case, after all this acquiescence, it is gravely argued that the claimant himself masked himself and ambushed so successfully as to make himself his opponent's witness to cover himself from all attacks upon himself tending to impeach him at all, and to turn his opponent out of his strong position to conclude the argument, a position won at the sacrifice of all his own witnesses, and take that position himself, because the court let his opponent ask him questions omitted when he was up. It is gravely argued that he thus managed to turn himself into his adversary's witness by this skilful deploying under cover, and that a court that would not allow him to consummate the end of this skilful maneuvre has abused discretion. We cannot think so.

That all this conduct of a cause in the nisi prius court rests in the discretion of the judge, see 14 Ga., 242; 19 Ib., 220; 20 Ib., 156; 45 Ib., 283. The last case is relied on by plaintiff in error; but the court say there: would be improper for this court to interfere with the discretion of the court below in the conduct of a cause on such a point." Whilst therefore in that case the court agreed with the court below which refused the recall of the witness, it did not disturb the well established doctrine that the matter rested in the discretion of the presiding judge. There the objection was made to the recall of the witness, and it was not allowed and the court was affirmed in not allowing it done; but there was in that case no acquiescence by the other side, no announcement that "we will introduce no evidence," no ambuscade, but an open objection and a fair fight. Had this been that case, the ruling would have been the other way; and the court would not only not have interfered with the discretion of Judge Brown, but would have approved its exercise.

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- 3. The third ground to be considered is in respect to the charge and refusal to charge. While put in many forms, the objections analyzed amount to but three at farthest. The main one is that the court would not rest the case on insolvency of the donor alone at the time of the gift to wife and children, but also brought under it the other issue, whether the deed of gift was made with intent to defraud, hinder or delay creditors. The court most clearly was right. Such is the Code, section 1952. Such is the principle ruled often by this court. It is enough to cite the Powell and Westmoreland case, 59 Ga., 256; 60 Ib., 572.
- 4. The next is that the court charged to the effect that if a donor be considerably in debt at the time he makes a deed of gift to his family, then the burden is upon him to show that the transaction is valid—not only that he was then solvent but that then there was no intention to defeat creditors. He must show himself amply solvent when he made the deed of gift. We see no error in the charge. 25 Ga., 684; 17 Ib., 220; 1 Story's Eq., 362, 363; Bump. on Fraud. Con., chap. 11, pp. 286, 294, 295. The words "amply solvent" are thus sustained.

In regard to the onus, it is enough to say that when claimant admitted possession in the defendant in fi. fa. in his own right, he admitted enough to condemn the property until he showed title in the claimant. He took the burden, and that burden was to show a clean title out of the defendant as an individual into the claimant as trustee.

To make the conveyance to wife and children such clean title, he had to show solvency, and if considerably in debt, ample means to pay what he owed to remove the presumption of intent to defraud or delay creditors—enough means to satisfy the jury that he did not have such intent, in connection with the other circumstances of the case. If his solvency or insolvency were a close question, as in this case, then the task would be more difficult to show a clean deed of gift, and if that

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deed were made when he had lost heavily on a venture in cotton, then it would seem almost impossible to convince the most credulous that such intent did not prompt the gift, especially if the donor himself had received it from his father months before, had not had it made then to wife and children, did not then make it himself, but waited until the cotton losses were already heavy.

5. The evidence supports, if it does not require, the verdict, and the presiding judge having approved it, we do not interfere.

Judgment affirmed.

Cited for plaintiff in error: 41 Ga., 196; 58 Ib., 451, 510; 59 Ib., 71; 60 Ib., 572; 61 Ib., 629; 45 Ib., 283; 3 M. and W., 505; 14 Ib., 95; Bump on Fraud. Con., 194; 3 Barb., 110; 17 Ga., 217; 64 Ib., 57, 352, 447, 582, 761, 63 Ib., 22, 85; Code, §1952; 25 Ga., 686; Story Eq., 362; 11 Wheat., 199; 1 Day (Conn.) 525; 53 Ga., 155; 59 Ib., 256; 60 Ib., 572; 56 Ib., 369; Bump on Fraud. Con., 295; 6, 540, 562; 12 Ill., 166; 9 Pet., 220; 18 Wend., 375; 3 Gratt., 26; 37 Me., 397; 34 N Y., 386; 8 Wall., 370; 3 B. & A., 262; 7 Ire., 341; 61 Ga., 373; Bump on Fraud. Con., 388, 327; 28 Ga., 174; Bish. on Law of Mar. Women, 757; 15 Ill., 101; Schouler's Dom. Rel., 282-3, note; 53 Ill., 186; 2 Heisk., 343; 59 Ga., 436; 60 Ib., 119; 61 Ib., 280; Code, §3715; 12 Ill., 166; 24 Ga., 211; Code, 3739, 3758; Burr. on Ass., 340.

For defendant: 14 Ga., 242; 19 Ib., 220; 23 Ib., 156; 25 Ib., 684. 17 Ib., 220; 1 Story Eq., 362, 363; Bump on Fraud. Con. chap. 11, pp. 286, 294-5, 284-5; 59 Ga., 485; 6 Ib., 265.

SPEER, Justice, concurred, but furnished no written opinion.

CRAWFORD, Justice, dissenting.

The real controlling question in this case was fraud or no fraud; the verdict necessarily turned upon it; the Cothran, trustee, vs. Forsyth, administrator.

jury had to decide it; they had to decide it on facts; facts are shown by testimony; the party introducing no testimony was entitled to the concluding argument; before a jury its importance is incalculable; in this case the court gave it to the plaintiff in fi. fa. as a right, because he offered, as it is claimed, no evidence.

We all concur in the legal principle involved, but disagree as to the legal effect of what transpired on the trial. The claimant assumed the burden on the opening of the case, offered his testimony and closed; the counsel for plaintiff in fi. fa., upon consultation, announced to the court that they would offer no testimony, but desired to call back to the stand a witness who had testified for a moment, and ask him some questions which had been omitted; no objection was made; he was recalled, examined as to entirely new matter, and the examination pressed, until the evidence swelled into proportions very nearly equal to that which had been given in by the claimant, and undoubtedly controlled the verdict. The court gave the conclusion to the plaintiff in fi. fa.

I think this was error. He was entitled to the conclusion upon one condition only, and that was that he introduced no evidence.

The law does not say, nor does it mean, that it depends upon whose witnesses are called to testify; it depends upon whether any evidence is offered; and if it is, whether from newly called or previously sworn witnesses is wholly immaterial. What the witness said was either evidence or nothing; it was held to be evidence, introduced as such, and was offered by the plaintiff after the claimant had closed, and this lost him the right, in my opinion, to the conclusion.

Neither do I think that it was necessary for the claimant to have objected; he had the right to stand on the law, and if any testimony was introduced by the plaintiff in fi. fa. he lost the conclusion thereby, and that whether it came from one witness or another. 45 Ga., 283; Rules Superior Court, 13.

Washington vs. The State.

## WASHINGTON vs. THE STATE OF GEORGIA.

- I. On a trial for an assault with intent to murder, the court need not charge the jury on the law of stabbing unless requested so to do. It was enough that the law of assault with intent to murder, and the law of assault and battery was given to the jury—the actual stabbing having been done by another than the defendant.
- 2. A woman was present at the stabbing with a knife by another, and furnished the knife with which it was done. She said to the actual perpetrator of the crime, "Martha, come, shell that God damned nigger, and get clear of her; get your satisfaction:"

Held, that these facts made such person a principal in the second degree.

Criminal Law. Charge of Court. Before Judge TOMPKINS. Chatham Superior Court. December Term, 1881.

Grace Washington was indicted for assault with intent to murder. On the trial, the evidence for the state was in brief, as follows:

The prosecutrix, Rosa Green, lived in the same house with Martha Shelman. On coming home one day about I o'clock, she found that Martha and defendant, who was with her, had eaten some of her meat; a quarrel ensued between these three. Martha and defendant taking sides against the prosecutrix, telling her to leave the house, and using abusive language towards her. Rosa went out and returned at night, when the three meeting again in the room, the difficulty again arose among them. Grace remarked to Martha, "Martha, come shell that God damned nigger, and get rid of her." She also told Martha to "get her satisfaction." Martha stabbed Rosa in the neck with a pocket knife, which had been given to her by Grace, the defendant. Rosa was rescued by the timely intervention of one William Jenkins, who was sleeping in the room.

The evidence for the defence was as follows: The de-

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fendant's statement denied all connection with the difficulty; one witness (Martha) was introduced, who testified that the quarrel was between Rosa and herself, and the defendant had nothing to do with it. The jury found a verdict of guilty. The defendant moved for a new trial on the following grounds:

- (1.) Because the verdict was contrary to the law and evidence.
- (2.) Because the court erred in not charging the jury the law as to the offence of stabbing under section 4369 of the Code of Georgia.
- (3.) Because the court erred in charging the jury that if defendant was present when the injury was inflicted upon Rosa Green, and encouraged the commission of the injury, then she is equally guilty, though she made no attempt to strike or cut Rosa Green.

The court overruled the motion, and the defendant excepted.

FRASER & WILSON, by brief, for plaintiff in error.

W. G. CHARLTON, solicitor general, for the state.

JACKSON, Chief Justice.

- 1. On the trial for an assault with intent to murder, the court need not charge the jury on the law of stabbing unless requested. It is enough that the law of assault with intent to murder be fully given to the jury, and the law in respect to assault and battery—the actual stabbing having been inflicted by another.
- 2. One who is present, aiding and abetting the stabbing by another, having herself attempted to stab with another knife, and having furnished the knife with which the stabbing was actually done, and having said to the actual perpetrator of the crime, "Martha, come shell that G-d d-n nigger and get clear of her"; "get your satisfaction," is a principal in the second degree; evidence to the effect

above stated will support a verdict of guilty; and when the presiding judge approves it, this court will not interfere.

Judgment affirmed.

## THE SOUTH CAROLINA RAILROAD COMPANY vs. NIX administrator.

- 1. Where bills of exceptions pendente lite are certified, filed and entered of record, when the case is brought up after final judgment, error may be assigned thereon upon motion in this court, though no mention be made of them in the main bill of exceptions. They are part of the record, and having been certified once need not be certified again.
- 2. The South Carolina railroad having been allowed to extend its line into Georgia, with the condition attached that suit might be brought against it in this state on all claims upon it, the right to sue it here was not confined to the citizens of Georgia, but extended to the citizens of other states. Therefore, a foreign administrator, upon complying with the conditions for the bringing of suits by such persons, might sue the corporation in Georgia, although the administration was in South Carolina and the right of action accrued under a statute of that state.
- 3. Where, in a suit brought in Georgia under a South Carolina statute which allowed the administrator of a decedent who left a parent or wife or children to sue for his homicide, the declaration failed to allege that he left such parent, wife or child, it could be amended.
- (a.) It could also be amended by setting out the South Carolina statute.
- 4. When a declaration is amended, the amendment relates back to the date of the filing of the original declaration, and if it be not barred by the statute of limitations the amendment will not be barred.
- (a.) The practice of the *lex fori* in respect to pleadings, amendments and the general mode of procedure will control, if it differs from the practice in the state where the cause of action arose.
- 5. If a passenger be ejected from a railroad train for failure to pay his fare, and after the train is in motion he tenders it, the conductor is not bound to stop the train to receive his fare and take him on board; if the tender were made while the train was standing still, the conductor was bound to receive the fare and admit the passenger.
- 6. Though a passenger on a railroad train may have failed to pay his

fare when demanded, yet if before being ejected he tendered it, it was the duty of the conductor to receive it and not eject the passenger.

- 7. When suit was brought in Georgia for a homicide which occurred in South Carolina, if the statute of that state did not require a prosecution as a condition precedent to a recovery in the civil case, such prosecution was not necessary in Georgia.
- 8. If the conductor of a train ejected a passenger so that he was run over and disabled by such train, and another train of the same road passing shortly afterwards extinguished what life was left, a right of action arose whether the actual death was caused by the first or second train.
- (a.) A declaration alleged that a passenger on a railroad train in South Carolina "was violently ejected and thrown from said cars by the defendant and its agents and servants in the course of their employment, and in being thus forcibly and unjustly ejected from said cars as aforesaid, was thrown thereunder and run over and killed thereby." The evidence showed that the passenger was run over and injured by this train, that about an hour afterwards another train ran over the body; whether life was extinguished by the first or second was not absolutely certain:
- Held, that such declaration furnished a sufficient basis for a recovery on these facts.
- (b.) If it were necessary to include any allegation concerning the second train in the declaration, it could be done by amendment.
- 9. The verdict is supported by the evidence.

Practice in Supreme Court. Railroads. Damages. Laws. Comity. Before Judge POTTLE. Richmond Superior Court. April Term, 1881.

To the October term, 1877, of Richmond superior court Nix, administrator of Brown, brought suit against the South Carolina Railroad for the homicide of his decedent. The action was brought under the statute of South Carolina, which provides that actions for homicides shall be for the benefit of the wife, husband, parent and child of the person killed, shall be brought by or in the name of the legal representative, and the recovery shall be divided among the beneficiaries like personal assets of an intestate. (Rev. Stats. S. C., p. 507.)

The defendant demurred to the declaration because it

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did not set out for whose benefit the action was brought, and did not set forth the South Carolina law on which it was based. This demurrer was heard on April 15th, 1880, and sustained, but with leave to the plaintiff to amend. During the April term, 1880, of court the case was called for trial. Plaintiff tendered his declaration amended in accordance with the above stated ruling. Defendant again demurred on the grounds that the original declaration was not sufficient to amend by (no beneficiaries having been set out therein), and that the cause of action set out in the amendment was barred by the statute of limitations (two years being the limit fixed by the statute). The demurrer was overruled.

The evidence for the plaintiff made, in brief, the following case: On the evening of August 11th, 1877, Brown, a colored man, took the train which left Augusta on defendant's road about 7 o'clock, P. M. When about two and a half miles from that place, the whistle was blown, the train stopped, and the conductor put Brown off. While they were going to the door. Brown pulled out two pieces of silver and said to the conductor, "Boss, don't put me off. I've got money to pay my way." The conductor said, "Why didn't you give it to me when I called for it?" Brown answered, "I was asleep." The conductor said, "You ought to keep awake and attend to your damned business. Now I have stopped the train, you have got to get off," and required him to do so. While standing on the ground Brown again asked to be allowed to pay his fare and tendered money, which the conductor refused and pulled the bell-rope. Brown had hold of the railing of the car, and swung round as the car started. As he did so, one passenger remarked to another, "There goes a dead nigger." In putting him off, both the conductor and train-hand pushed him. Next morning the body of Brown was found on the track, the trunk being severed and showing signs of having been dragged along the track a short distance and badly muti-

lated. He appeared to be tight at the time when he was put off. There was also testimony as to the value of his services, his habits, etc., not material here.

The evidence for the defendant was, in brief, as follows: The conductor asked Brown for his fare, but the latter said he had no money except a nickel, which he offered, and the conductor refused. The conductor told him he would have to stop the train and put him off. Brown said he had no money; the train was stopped and he was told to get off, which he did, stepping clear of the edge of the car. After the signal for starting had been given, and the train was about moving (the cars near the engine having actually begun to move), Brown asked to be allowed to get on board, and said he had money, but did not show any. The train moved on. One witness (who was in jail under indictment for breach of trust at the time of testifying) stated that he was a passenger and saw the rear car pass Brown. A freight train left Augusta about an hour after the passenger train. The engineer kept a good lookout for obstacles on the track, but saw nothing, and there was no sign on the engine of having passed over a body. Another train passed the place about seven o'clock next morning, and the engineer discovered the body. No violence was used in putting Brown off. He got off on the left hand side of the track; when found the body lay across the right hand rail and was severed in two.

There was some other evidence as to the habits of Brown, etc., not material here.

The jury found for the plaintiff \$1,500.00. Defendant moved in arrest of judgment, and also moved for a new trial on the following grounds:

- (1.) Because the court erred in not dismissing the case.
- (2.) Because verdict is contrary to the law and the evidence in the case.
  - (3), (4), (5.) Substantially as the second ground.
  - (6.) Because the court charged the jury as follows: "If

the conductor put him off the train for his refusal or failure to pay his fare, and while off the train and on the ground, while the train was in motion, Brown then became willing and ready to pay his fare, and did tender it, the conductor, who must be presumed to be familiar with his schedule and those of other trains and the necessities of the service, was under no legal obligation to stop his train and take him on, and if the injury occurred under this state of facts, the defendant is not liable," the error of the charge consisting in this, that it left the jury to infer that if under the other circumstances, as stated, and the train was not in motion at the time, then the conductor would have been bound to have accepted the fare, and if he refused the defendant would be liable.

- (7.) Because the court charged the jury, "If the conductor demanded his fare, and Brown failed or refused to pay it at first, and while he was taking him from his seat for the purpose of ejecting him. Brown, then on the train, tendered him the full amount of his fare, and it was refused by the conductor for the reason of his first refusal, an ejection then was unlawful, and the defendant is responsible for the consequences of that act of the conductor; this is true, especially if you believe from the evidence that Brown's failure to pay his fare when first demanded was due to his mental condition.
- (8.) Because the court charged the jury: "If you believe that Brown was killed by the second train, and the first train was in no wise connected with the injury, then the plaintiff is not entitled to recover in this action; but if you believe that Brown was injured by the wrongful act of the conductor of the first train, the defendant is responsible though he was actually killed by the second train.
- (9.) Because the court refused to charge the jury as follows, when requested in writing by defendant: "A passenger who fails to exhibit his ticket or to pay his fare on a reasonable demand therefor, forfeits his right to be car-

ried further, and may be ejected at once, and after the signal has been given to stop the train for the purpose of removing him from it, cannot regain his right to be carried by his exhibiting it, or offering to pay, and a conductor is justified in persisting, notwithstanding its exhibition or such offer, in ejecting him."

- (10.) Because the court refused to charge the jury as follows: "If the jury believe the killing was under circircumstances which showed a wilful and malicious disregard of human life, then there can be no recovery in a civil suit for damages unless a criminal prosecution has been instituted, or plaintiff has satisfactorily explained why such prosecution was never instituted.
- (II.) Because the court refused to charge as follows: "If the jury believe that Brown was not killed by the train from which he was ejected, but by another train passing along defendant's road, an hour or more later, such killing would be too remote a consequence of the eviction, and too different a transaction from that set forth in the declaration, and too much dependent upon other circumstances for the plaintiff to recover in this action."
- (12.) Because the court refused to charge as follows: "This action is brought for damages for the killing of Anderson Brown by the train on which he had been traveling; the proof must correspond with the allegation. Evidence that Brown was killed by defendant in a different way and at a different time will not sustain this action, although the defendant might be liable for such killing in another action. If, therefore, the jury believe that Brown was killed by another train of defendant than that from which he was evicted, the plaintiff cannot recover in this action."

The motion was overruled, and defendant excepted.

When the demurrer to the declaration was overruled, exceptions *pendente lite* were certified and placed on record. No mention was made of them in the final bill of exceptions. When the case was called in the supreme

court, counsel for plaintiff in error moved to be allowed to assign error on such exceptions. The motion was allowed, as set out in the first division of the decision.

BARNES & CUMMING, for plaintiff in error.

FOSTER & LAMAR, for defendant.

JACKSON, Chief Justice.

I. In this case, the record showed that bills of exceptions pendente lite had been taken and allowed in the superior court during the progress of the case, but no mention was made of them in the bill of exceptions finally certified, and which brought the cause before this court by writ of error, and no assignments of error are made thereon in that final bill of exceptions.

Thereupon the plaintiff in error moved to assign error on these interlocutory bills of exception, which appeared legally certified and allowed in the transcript of the record.

The motion must be granted under section 4250 of the Code, and the practice of the court in regard thereto and in construction thereof.

The only object of a bill of exceptions is that the judge may certify that which transpires before him, and which is not otherwise of record. When that is once done it need not be repeated; and, therefore, where he has allowed and made record of an interlocutory bill of exceptions by certifying it once, he need not repeat the certificate in another and the final bill of exceptions, and such is the express language and sense of the statute. It enacts: "But at any stage of the cause, either party may file his exceptions to any decision, sentence, or decree of the superior court, and if the same is certified and allowed, it shall be entered of record in the cause, and should the case, at its final termination, be carried by writ of error to the supreme court by either party, error may be assigned

upon such bills of exception," etc. What bills of exception? Of course, those thus certified and entered of record.

If either party takes the case up by writ of error, error may be assigned on these bills of exception by the party which so excepted.

So that, although one party sued out the writ of error by the final bill of exceptions, the other may assign error on these exceptions thus found in the record. This is a right he could not exercise in the bill of exceptions of his adversary without his consent, and hence he can only assert it independently by assigning error on his own bills of exceptions certified before by the judge, and found in the record.

Nor is there any trouble in regard to want of notice to the other side. The record of what transpires in court in a case is always notice to parties. When these interlocutory bills of exceptions are certified and allowed and made record, the other party has notice, and must prepare to meet the assignments of error thereon, which his adversary has the legal right to make on the calling of the case in this court.

2. The plaintiff is the administrator of a decedent who was killed by the defendant in the state of South Carolina, on the South Carolina railroad, about three miles from Augusta. Letters of administration were issued to the plaintiff in that state, who complied with the law as contained in section 2615 of the Code of this state, and was thereby entitled to sue, by virtue of sections 2614 and 2615 of the Code, in the courts of this state. The defendant, the South Carolina Railroad Company, by an act of the general assembly of this state, was empowered to cross the Savannah river and run their road into Georgia at Augusta, on condition, or with the provision, that suit might be brought against it in this state on "all claims" upon it.

This is a claim upon it by virtue of a statute of South

Carolina, which authorizes the administrator of a decedent to sue the road for the homicide of the husband and father for the benefit of the widow and children, and this administrator, though appointed in another state, having complied with our terms enacted in the sections of the Code above cited, has the right to sue in this state. The defendant is an artificial person created in South Carolina; vet Georgia permitted this treature of South Carolina to put foot on her soil, and the corporation thereupon accepted the privilege or franchise to do so and agreed thereby to be sued here. Richmond county is the locus—the venue which the stranger occupies in Georgia, and where, by the agreement, this stranger may be sued. By the spirit of decisions of this court (43 Ga., 461; 49 Ib., 106; 52 Ib., 565; 59 Ib., 426; 61 Ib., 132), and that of the supreme court of the United States, in 103 U. S. R., p. 11, which latter case fully covers this point, the claim to sue, or cause of action growing alone out of the South Carolina statute, may be brought and enforced in this state, under the facts above narrated. Whilst, doubtless, the right to sue this company in this state was acquired by Georgia when permission was given this railway company to enter Georgia, for the benefit of her own people, as is said in 64 Ga., pp. 18-30, nevertheless, when she acquired this right to sue for her own citizens, the constitution of the United States gave it to the citizens of all the other states of the Union. Constitution of the United States; Code of Georgia, §5200. A citizen of South Carolina might, therefore, have sued here, and an administrator in that state, on complying with our law in respect to suits brought by foreign administrators, has the same right and may sue.

3. By the assignments of error on the interlocutory bills of exceptions it is insisted that the declaration is bad, because by the South Carolina statute, as construed by the courts of that state, 15 Rich., 201, it should appear that decedent left a parent, or wife, or children, and no aver-

ment to that effect is made. The court so ruled in this case, but allowed the plaintiff to amend by the allegation that the decedent left a wife. By the decision in 15th Richardson, the amendment was allowable and was properly granted. And we think also that it was properly granted in respect to setting out in the declaration the South Carolina statute.

4. When amended, the amendment relates back to the original declaration, and the date of its filing is the date from which the statute of limitations will be counted. Such is the ruling of this court in 63d Ga., 243, Rutherford, executor, vs. Hobbs, and such we presume is the law of South Carolina. The practice of the lex fori, in respect to pleadings, amendments and the general mode of procedure would prevail, however, even if the rule were different in the courts of the state where the injury occurred. 49 Ga., 106. But it seems that the courts of South Carolina rule that there is enough to amend by in such an original declaration as this was, and would not allow the defect to be taken advantage of in arrest of judgment, which is the test. 15 Rich., 201 supra.

We see no error, therefore, in the assignments of error made here on the interlocutory bills of exceptions, which are that there was nothing to amend by, and that the statutory bar should have been applied, because over two years had elapsed from the date of the homicide to the date of filing the amendment.

The action, therefore, in our view of the law, was in court on a good, substantially good, declaration, having been amended in substance as allowed since the act of 1853-4, Code, §3479, by the laws of this state, and also by the law of South Carolina.

5. We come, then, to errors assigned on the charges and refusals to charge on the merits of the case.

On the 6th ground it is alleged substantially that the court erred in charging, that if the train was in motion the conductor was not bound to stop it and receive fare

from the passenger ejected for not having paid it when demanded, but inferentially that he ought to do so if the train was not in motion when the tender was made. We think that the charge accords with good sense, and is good law.

- 6. A fortiori we think the charge that if it was tendered before ejection but after the first failure to pay on demand, then the conductor should have received it and not ejected the passenger, must be good law, and therefore the seventh ground was properly overruled. The refusal to charge as requested in the ninth ground is covered by the above ruling and must abide the same fate.
- 7. The South Carolina statute does not require a prosecution for the homicide if felonious, and the Georgia jurisdiction does not extend over South Carolina in prosecutions for crime; therefore there was no error in overruling the tenth ground, even if the crime had been committed while Georgia statute or laws required such criminal prosecution before a civil action for damages would lie.
- 8. The refusals to charge as requested in the eleventh and twelfth grounds of the motion, which are to the effect that the killing must be shown to have been done by the particular train from the cars of which the passenger was ejected, and that damages for the killing by another train subsequently passing over the body could not be recovered under this declaration, must be considered in connection with the allegation in the declaration and the charge given by the presiding judge and excepted to in the eighth ground. The declaration avers that the plaintiff "was violently and forcibly ejected and thrown from said cars by the defendant, and by its agents and servants in the course of their employment, and in being thus forcibly and unjustly ejected from said cars, as aforesaid, was thrown thereunder and run over and killed thereby."

The charge given by the court is, "that if you believe that Brown was killed by the second train and that the

first train was in no wise connected with the injury, then the plaintiff is not entitled to recover in this action, but if you believe that Brown was injured by the wrongful act of the conductor of the first train, the defendant is responsible though he was actually killed by the second train."

The allegation is that "he was thrown thereunder and run over and killed thereby." The charge is to the effect that if he was thrown thereunder and thereby injured by the wrongful act of the conductor, and run over even by the second train and killed, having been first injured by the act of the conductor of the train whence he was thrown, then the company would be liable. Is this charge error? We do not think so. It might have been plainer, but it is clear that if this passenger was thrown under the first train and injured thereby so that the next train ran over and killed him in consequence of that injury, the allegation in the declaration would support a recovery therefor; because the act of killing would necessarily have been the joint act of the two trains, the first disabling him by the injury inflicted in throwing him under it, and the second train consummating the wrong by the actual killing or extinction of all the life left in him.

Suppose the second train, instead of passing over the road in one hour, had passed in five minutes, and he had been thrown under the first and been disabled, and then the second had rushed over him and extinguished life, would not the allegation have supported the charge? If so, why not if he lay there disabled for an hour, and was then run over by the second train and life then extinguished?

Suppose there had been a prosecution for murder, who would be found guilty thereof, the conductor of the train who did the deed of throwing him off and under, or the conductor of the other train who ran unconsciously over him? Clearly he who did the intentionally wrongful act, and whose act caused his death.

Mark it, the allegation is not specifically that the train from which he was ejected ran over him, but that he was run over after being thrown thereunder, without alleging by what train, and killed thereby, that is by being run over. It is enough if he was run over by any train, and that train ran over him and killed him because of injuries received by being thrown out of and under the first train.

Besides, we do not think that a reversal on this charge and these refusals can alter the final result. The declaration could be amended so as to embrace the second train, if need be, and the evidence is almost overwhelming, if not quite so, that the whole injury, killing and all, was done by the first train. The other may have struck the dead body and dragged it afterwards. In law the killing by either train would give a right of action. 60 Ga., 441.

9. The verdict is abundantly sustained by law and evidence.

In our judgment it ought to stand. Whilst conductors must necessarily have control of cars and passengers, and be invested with much power in regard to the collection of fare and the orderly conduct of passengers, and may eject the passenger if he does not pay, or put him off if unruly, yet it must be done with great regard to the safety and preservation of limb, and much more of life, of that passenger over whom the power is exerted.

Judgment affirmed.

Cited for plaintiff in error: Rosen on Inter. Stat. Law, p. 155 et seq.; 167 et seq.; 64 Ga., 25, 30; 65 Ib., 496; 55 Ib., 194; 15 Rich., 201; 43 Ga., 461; 49 Ib., 106; 15 Gray, 20; 29 Am., 458, 471; 30 Ib., 611, 606; 52 Ga., 466, 467; Redfield's R. R. Cases, vol. 11, p. 440; 1 Redfield on Railways, p. 95; 7 Metcalf, 596; Central Law Jour., July 16, 1880, p. 47; 47 Iowa, 82; 32 Ohio, St., 345, 38 Ga., 409; 61 Ib., 151.

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#### Williams ru. Moore & Watkins.

For defendant: Code, §4250; 56 Ga., 230; 59 Ib., 146; 9 Rich., 84; 4 Ib., 61; 10 Ib., 227; 103 U. S., 11; 59 Ga., 426; 52 Ib., 465; 61 Ib., 132; 49 Ib., 106; 43 Ib., 461; L. & N. R. R. vs. Garrett, Sup. Court Tenn., 1881; 55 Cal., 570; 36 Am., 50; 60 Ga., 441; 59 Ib., 593; 64 Ib., 306; 29 Am., 681; 9 Ib., 437; 5 Cal., 460; 38 Conn., 557; 30 Am., 602; 35 Ib., 279; 34 Ib., 277; 60 Ga., 441.

#### WILLIAMS vs. MOORE & WATKINS.

- 1. To lay the foundation for introducing a certified copy of a deed from the records, the party seeking to use such evidence should testify not only that he has not the deed in his possession, power or custody, but also that he believes it has been lost or destroyed.
- (a.) An examination preliminary to the introduction of such secondary evidence, resting largely in the discretion of the presiding judge, the person holding the original deed having resided in another state, and there died, and this being the sole point of doubt in the case, this court will not grant a new trial thereon.
- 2. Where an attesting witness to a deed executed in New York stated in the body of his attestation that he was a commissioner resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of Georgia to take acknowledgments of deeds, his attestation (another witness also signing) was sufficient to admit the deed to record in this state, although he wrote after his signature "a commissioner of deeds for New York."
- 3. After proper proof by a constable that he made diligent search for personal property and failed to find any, and that the f. fa. in his hands was thereupon levied on realty, the court could allow him to make an entry of no personalty nunc pro tunc, although a sale had taken place under the levy, and the question arose in an ejectment suit based thereon.
- (a.) Such an entry was not an amendment of the f. fa. so as to vitiate the levy and sale thereunder.
- 4. While persons cannot lawfully combine to reduce the price of property offered at sheriff's sale, or the number of bidders therefor, or for the purpose of interfering with any right of the defendant in fi. fa., yet two persons may lawfully join their interests and bona fide purchase in common at a sheriff's sale.
- 5. The other exceptions are covered by the ruling in 51 Ga., 453.

Williams vs. Moore & Watkins.

Evidence. Deeds. Registration. Levy and Sale. Constables. Executions. Partnership. Before Judge MERSHON. Glynn Superior Court. May Term, 1881.

Reported in the decision.

SYMMES & ATKINSON, for plaintiff in error.

J. M. VINCENT; GOODYEAR, HARRIS & KAY, for defendants.

CRAWFORD, Justice.

Moore & Watkins brought suit in ejectment against William Williams to recover a lot in the city of Brunswick, to which they claimed title.

The facts appear to be that a corporation known as "The Proprietors of the City of Brunswick," sold the premises in dispute to one James B. Taylor; that in 1872, the said Taylor having died, the lot in question was given in for taxes by one C. S. Schlater, agent for the estate of Taylor; that the taxes not being paid, a tax f. fa. was issued, the lot levied on, sold and bought by the plaintiffs; that Williams being in possession, this suit was brought against him, and the plaintiffs obtained a verdict, which he sought to set aside, but failing, brings the case to this court for the errors alleged to have been committed on the trial.

1. The first error alleged and relied upon is, that the court erred in admitting in evidence a certified copy of the deed to Taylor without laying the proper foundation therefor.

The 42d rule of the superior court requires that, "in order to introduce the copy of a deed in evidence, the oath of the party stating his belief of the loss or destruction of the original, and that it is not in his possession, power or custody, shall be a sufficient foundation for the introduction of such secondary evidence."

The parties in this case testify that they never had the

#### Williams vs. Moore & Watkins.

original deed; that it never was in their possession, custody or control; but they say nothing whatsoever as to their belief of its loss or destruction, or that they had made any search for or effort to ascertain whether it was lost or destroyed. Whilst the examination preliminary to the introduction of secondary evidence must be left largely in the hands of the presiding judge, we think that the rule of court in this case was not strictly complied with, so as to admit the copy deed in evidence. But as the evidence showed that Jos. B. Taylor resided in the state of New York in his life time, where a subpana duces tecum would not reach him, and where the parties could only have made inquiry as to the original deed, and obtained it if the executor chose to deliver it up, we cannot say that the judge so abused his discretion in admitting the copy, legally recorded in this state, as to justify the grant of a new trial, especially as this is the only doubtful ruling made by the judge during the progress of the case.

2. It was further insisted, that the deed was improperly recorded because the same had been attested by Jas. B. Grady, a commissioner of deeds for New York, when it should have been by a commissioner of deeds for Georgia. This attesting witness recites in the body of his certificate that he is "a commissioner resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the state of Georgia, to take acknowledgments of deeds," etc., which is sufficient prima facie to establish the fact of his official power to act as such commissioner, and to attest deeds in the state of New York for lands in Georgia, and this, notwithstanding he signs his name and adds thereto the words, "a commissioner of deeds for New York."

We think that, taking the whole paper together, its only meaning and effect is that he was a commissioner of deeds for Georgia in the state of New York, and, therefore, that the record of the deed was not illegal.

3. Another error complained of is the fact that the 
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judge allowed the constable, after proper proof by him, to enter on the fi. fa. nunc pro tunc, no personal property to be found upon which to levy the same. Before this entry was made, the constable testified that he had made diligent search for personal property upon which to levy the execution, but failed to find any. There was no error in allowing this entry to be made under §3498 of the Code, and 55 Ga., 145, nor was it such an amendment of the fi. fa. itself as to vitiate the levy; indeed the amendment did not go to the fi. fa. at all.

4. Another ground of error alleged is that the judge charged the jury as follows: "That if you find from the evidence that Moore and Watkins formed a partnership with the view of defrauding the rights of the defendant in that tax fi. fa., either by preventing a sale for its full value, or for the purpose of reducing the number of bidders for the property, it would be a fraud, but I charge you that it is competent for persons to join their interests in the purchase of property at any sale, whether tax sale or not, provided it is not organized for the purpose of reducing the value of the property, or in some way interfering with the rights of the party whose property was to be sold."

We see no error in this charge of the court.

5. There are several other assignments of error in the bill of exceptions, but they fall under, and are ruled fully by the case of *Doe ex dem*; W. F. Williams, adm'r, and vs. Roe, cas. eject., and Richard Young tenant, in 51 Ga., 453.

Judgment affirmed.

Reed, guardian, vs. Reed, executrix.

## REED, guardian, vs. REED, executrix.

- 1. A will contained the following item: "I give to my son, Milton P. Reed, city lot No. 53, on Marietta street, also lot 72, known as the mill property, containing about twenty-two acres. The mill and five acres of this lot has been sold to Mr. Grantham. Milton will receive the proceeds of this sale:"
- Held, that by this item the property or its proceeds were left to the son of the testator, and the mention of the name of the purchaser of a portion of it was merely incidental. Therefore, if the sale to him was rescinded, and a part of the property was sold to another purchaser, the legacy was not adeemed, but the proceeds of the second sale passed to the legatee.
- A mere offer or proposal of a testator to appropriate money which would be covered by a legacy in his will to some other object, if never consummated, would not adeem the legacy.

Wifls. Legacies. Before Judge HILLYER. Fulton Superior Court. October Term, 1881.

Reported in the decision.

MARSHALL J. CLARKE, for plaintiff in error.

T. P. WESTMORELAND, for defendant.

CRAWFORD, Justice.

John M. C. Reed died testate. The fourth item of his . will is as follows:

"I give to my son, Milton P. Reed, city lot No. (53) fifty-three, on Marietta street, also lot (72), known as the mill property, containing about twenty-two acres. The mill and five acres of this lot has been sold to Mr. Grantham. Milton will receive the proceeds of this sale."

The record shows that before the death of testator the sale of the mill property to Grantham was canceled. The testator having to take the property back, he afterwards succeeded in selling a part of it, to-wit, the engine and fixtures to one Cowen for one thousand dollars.

Reed, guardian, vs. Reed, executrix.

This bill was filed by the executrix asking direction of the court as to the disposition of the proceeds of this sale, setting up by her bill that the testator in his life-time intended and offered to use the same in the payment of his debts, and that since his death the same was claimed by the said Milton P. Reed, the legatee named in the fourth item of the said testator's will.

The judge below held and decreed that the proceeds of the last sale did not pass to the said legatee.

1. It is conceded by counsel for the defendant in error that by the foregoing item in testator's will he intended for this legatee to have the mill property or the proceeds of the sale to Grantham; but it is insisted that, by the cancellation of that trade and the subsequent sale of a part of the property to Cowen, and an offer by the testator to use the proceeds otherwise than provided for by his will, was an ademption of the legacy.

The clear intention of the testator was that his beneficiary was to have the mill property, or the proceeds of the sale, and that regardless of the fact as to whether the same were realized from Grantham or from another purchaser. The mentioning of the name of Grantham was incidental and immaterial to the bequest; whether inserted or omitted did not affect the rights of the legatee to the proceeds of the sale. Had the testator simply said, after giving the lot 72, known as the mill property, "five acres of this lot have been sold, and Milton will receive the proceeds of this sale," it would have conveyed to him just what was conveyed, no more and no less.

That the testator had to take back the property did not affect the legatee's right; for his bequest is of the lot known as the mill property, and the proceeds of that part which is sold. Nor did the fact that the testator afterwards could effect a sale for a part only of the mill property, change the rights of the legatee to that of the proceeds of the sale, any more than if the original sale had been rescinded precisely to the same extent.

Reed, guardian, vs. Reed, executrix.

It is to be remembered in this connection that complainant's bill shows that the engine and fixtures were a part of this mill property, used to run the machinery and embraced in the sale to Grantham.

The only difference between the condition of this legacy when the will was executed, and when the testator died, was that he had substituted the notes of Grantham with those of Cowen. That he did not have them for precisely the same amount does not change the legal principle. To the extent that he could substitute the one for the other he did so, and for the balance he had the identical property. Where a testator exchanges the property bequeathed for other of like character, the law deems the intention to substitute the one for the other, and the legacy will not fail. Code, §2464.

It is true that a legacy is adeemed when the testator conveys to another the specific property bequeathed, or otherwise places it out of the power of the executor to deliver over the legacy.

In this case there was such provision by the will as secured without tail either the property or the proceeds of the sale to the legatee.

There existed but one possible chance for its ademption, and that was the placing the property or the proceeds thereof out of the power of the executor to deliver the same. That contingency did not happen; the property in part and proceeds in part are in the hands of the executrix; she can deliver both over, and it is her duty to do so.

2. It is, however, most earnestly maintained that not only this exchange of notes, but the offer of the testator to use those of Cowen in the payment of his debts is sufficient to establish the ademption of this legacy.

Thus to hold, would be to declare that any disposition proposed, or exchange of property suggested, or offer to sell, or intention to use in any other way property bequeathed, inconsistent with such bequest, would be equivalent to such absolute sale or other disposition thereof.

Weatherly zs. Hardman.

That the testator thought of or even proposed to pay a debt with Cowen's notes, would be no ademption of the legacy unless the thing had been done; no more indeed than a failure to sell the remainder of the mill property, unbought by Cowen, would have defeated the bequest by an offer to sell the same to any one else.

Nor is this view of the law at all inconsistent with the ruling in the case of Rogers vs. French, 19 Ga., 316. In that case the question was whether an advance to a legatee by the testator in his life time, and after the making of his will, was an ademption of the legacy given by the will. The court held that it was a question of intention which might be deduced not only from the face of the will, but might be destroyed or confirmed by parol evidence. Whilst we admit that questions of advancement are questions of intention, and parol testimony will be heard to ascertain intention in such cases, yet we do not think that mere declarations of a testator will be heard to revoke a legacy, or set aside a will where no such question arises.

Judgment reversed.

### WEATHERLY vs. HARDMAN.

- 1. The debt of a firm is the debt of each of its members. Therefore, after bankruptcy of the firm and its members, a new promise by one of the partners to pay a note of the firm given before bankruptcy was based on a good consideration, and was not a promise to pay the debt of another, so as to fall within the provisions of the statute of frauds.
- 2. The verdict was supported by the evidence.

Partnership. Contracts. Bankruptcy. Before Judge ERWIN. Clarke Superior Court. November Term, 1881.

Reported in the decision.

S. P. THURMOND; JNO. C. REED, for plaintiff in error.

#### Weatherly vs. Hardman.

E. K. LUMPKIN; E. T. BROWN; J. H. LUMPKIN, for defendant.

CRAWFORD, Justice.

W. A. Weatherly was sued by W. B. J. Hardman, upon a promissory note made by Weatherly & Co. The said firm and each member thereof having been discharged in bankruptcy, the plaintiff relied upon a subsequent promise made by the said W. A. for the recovery of the amount due on the note. The defendant resisted the collection of the debt, but the jury found for the plaintiff, and the defendant moved for a new trial.

There are but two questions made by the record which need be adjudicated to settle the rights of the parties in this case, one of law, the other of fact.

1. It was maintained by counsel for plaintiff in error, that the note sued upon being a joint note, and made by the firm, that there was no moral obligation on the defendant to pay more than one-half of it, and that no promise therefore to pay it at all was binding upon him unless the same was in writing.

This is not a sound principle of law, for the reason that the original liability was not only against the firm, but each individual member thereof. The debt of a firm is as much the debt of each partner until paid as it is the debt of the firm.

So that the promise of the defendant to pay the note was not a promise to pay the debt of another, either in whole or in part, but to pay a debt of his own.

We think, therefore, that the court ruled the law correctly both as to the amendment offered, and in his charge to the jury.

2. It is admitted that a new promise to pay one's own debt after bankruptcy binds the promissor, but it is denied that there was any unconditional promise by this defendant to pay.

This constitutes the question of fact made by the record.

#### Finch et al. vs. Beal.

When the evidence is conflicting, and the judge commits no error in his charge to the jury, and he is satisfied with the verdict, this court will not interfere to set it aside.

Judgment affirmed.

## FINCH et al. vs. BEAL.

- 1. One who buys with notice of an equity buys subject thereto.
- Actual possession of land is notice to the world of the rights of the
  occupant therein, and one who buys while such actual possession
  continues is affected with notice.
- (a.) D. sold land to H. and gave him bond for titles, only a part of the purchase money being paid. H. sold a part of the land to B., receiving a part of the purchase money and giving bond for titles; B. went into actual possession. Afterwards H. sold to F. the remaining portion of the lot (less a small lot sold to a third party), gave bond for titles, and agreed to erect certain improvements. After paying H. in full, F. being alarmed about the title, took an assignment of the bond for titles held by H., paid the balance due thereon, and took a deed from D.:
- Held, that F. was subrogated to the position of H. and not of D.; that he bought with notice; and upon the payment of balance of purchase money due by B., equity will compel F. to make titles to him. Especially so, where, at the time of taking the assignment of the the bond from H., F. agreed to protect B.

Title. Contracts. Notice. Before Judge POTTLE. Clarke Superior Court. November Term, 1881.

Reported in the decision.

GEO. D. THOMAS, for plaintiffs in error.

S. P. THURMOND; A. L. MITCHELL; L. & H. COBB, for defendant.

SPEER, Justice.

The defendant in error filed his bill in Clarke superior court, alleging in substance, that one Floyd Hill bought

#### Finch et al. vs. Beal.

a certain lot in Athens from A. P. Dearing, at the price of \$1,500.00, for which he gave his note and took Dearing's bond for titles; that complainant then bought onefourth of said lot from Hill, taking his bond for titles. paying him \$200.00 in cash and his note for \$150.00; that he went into possession of the lot purchased, and erected valuable improvements thereon; that subsequent to his purchase, and with full knowledge thereof, the plaintiffs in error, L. F. & J. F. Finch, bought from said Hill onehalf of said lot at \$1,200.00, Hill also agreeing to erect a certain house thereon and other improvements; that the remaining one-fourth of the lot Hill sold to Lewis; that after this, Hill and the Finches confederated to defraud him, complainant, out of his land so purchased, and Hill transferred to the Finches his bond for title held from Dearing, and Dearing, in pursuance of said transfer, has made a deed to the whole lot to the Finches, they paying him \$1,264.00. the balance of purchase money due by Hill to Dearing; Hill is insolvent, and the Finches are threatening to eject complainant from his lot. Complainant prays so much of Dearing's deed to the Finches as covered the lot of complainant, bought of Hill, be canceled, and Dearing be decreed to execute titles to him on payment of balance of purchase price, or that the Finches make title to complainant for said one-fourth upon such payment, and in the meantime the Finches be enjoined from interfering with complainant's possession of said lot.

To this bill the Finches filed their answer. On the trial thereof, the jury, under the charge of the court and evidence submitted, found a verdict in favor of the complainant, "that upon his paying to the Finches the balance due on his note to Hill, that the Finches should make to complainant a quit claim deed to the premises in dispute." Whereupon defendants below made a motion for a new trial in said case on various grounds, as they appear in the record, which was overruled by the court, and they excepted.

The record discloses the following facts in the case:

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That Floyd Hill bought of A. P. Dearing an acre lot in the city of Athens, for which he agreed to pay him the sum of fifteen hundred dollars, and gave his note for that amount, receiving from Dearing a bond for titles to be made on the payment of the purchase money; that soon after said purchase he sub-divided said lot, and sold onefourth of it to the complainant, Beal, receiving therefor two hundred dollars cash and his note for one hundred and fifty dollars, due at the end of the year. He, thereafter, sold another fourth of the lot to Lewis, and retaining the east half of the lot as originally purchased, he commenced improving it. It was fenced off from the other lots. After buying his lot, complainant moved a stable on it and fenced it, dug a well, etc., the whole amounting in value to some two or three hundred dollars: that after the sale of the lots to Beal and Lewis, Floyd Hill sold the eastern half of the lot he had commenced improving to the defendants, the Finches, agreeing to build them a house on it, and receive for lot and improvements \$1,200.00. It further appears that Hill had paid Dearing only about three hundred and fifty dollars on the purchase of the lot. The Finches, becoming uneasy, (as they had paid Hill the twelve hundred dollars promised for the house and lot) procured Hill to assign them the bond for titles he held of Dearing, on certain terms stated in the assignment, and then paid Dearing the balance due, to-wit: \$1,264.00 on the lot, owing by Hill. The proof also shows that at the time, or before the assignment of the bond by Hill to Finch, as an inducement and part consideration of the assignment, he promised Hill that he would protect Lewis and Beal, to whom Hill had sold and who held his bonds for title. The Finches, after procuring the title, refused to make title to Beal, demanded rent and threatened to eject him; whereupon Beal filed this bill to compel the Finches to make him a title on payment of the balance of the purchase money.

"He who takes with notice of an equity takes subject

## Finch et al. vs. Beal.

to that equity." Beal, the evidence shows, was in possession of and improving the lot he purchased of Hill long before the Finches intervened to secure a transfer of Dearing's bond from Hill. It is clear that Beal, having paid two hundred dollars cash on the lot, when he bought, had an equity to that extent in the title thereof, and being in possession under that purchase, the rule, often recognized by this court, would apply that, "the actul possession of land is notice to all the world of whatever rights the occupant really has in the premises, and the vendor cannot convey to any other person without such person being affected with notice." 47 Ga., 483; 61 Ib., 608; 48 Ib., 885.

With Beal in possession, when Finch intervened and took a transfer of the bond for titles from Hill and procured a deed from Dearing, he placed himself in the shoes of Hill so far as Beal was concerned, and much more would this be true if, at the time of taking the transfer of the bond from Hill, he agreed with him, as some of the witnesses testify, that he would protect Beal and Lewis in the possession of their lots, sold by Hill to them, and for which they held his bond for title.

We do not agree with the counsel for plaintiff in error in assigning to the Finches the position of Dearing, the original vendor. They occupied Hill's place as the vendee when they claimed the fulfilment of the bond he held as transferee. They could claim no more rights under that transfer, and the title made in pursuance thereof, than Hill could, when they bought with full notice of Beal's equity, and as such they must do what equity would compel Hill to do—specifically to perform and fulfil the contract Hill had made with Beal. Under our view of the law and facts of this case, we see no error in the instructions given by the court to the jury, nor any such error as complained of in the motion for new trial as would lead us to reverse the judgment.

Groves, ordinary, for use, vs. Williams, administrator, et al.

The evidence, we think, sustains the verdict; the credibility of the witnesses was a question for the jury, and we think the law was fairly administered.

Let the judgment below be affirmed.

# GROVES, ordinary, for use, vs. WILLIAMS, administrator, et al.

- I. Where a bill was filed to settle an estate, and a decree rendered in favor of some of the heirs against the administrator for a certain amount (specifying the amounts due them), and the decree provided that if the estate of one of the heirs who owed the estate and was dead should prove insolvent, then the others should contribute pro rata to make up the deficiency, in a subsequent suit by one of the heirs (or his assignee) on the administrator's bond for failing to pay the amount due him under the decree, it could be pleaded and proved that the estate of the deceased heir was insolvent, and the amount which the plaintiff was liable to pay on account thereof could be set off against his claim.
- A judgment on which no f. fa. has been issued for seven years becomes dormant.
- 3. After a judgment has become dormant, but before the time for reviving it has expired, it is an evidence of debt; but to establish a devastavit of assets of the estate, and render the administrator and his sureties liable on his bond for not paying such debt, it is necessary to prove inability or refusal on his part to do so.
- (a.) A return of *nulla bona* cannot be made on a fi. fa. after it has becon e dormant.
- 4. Though the same person may be the administrator of an intestate and also of one of his heirs, on a bill by him to settle the estate including all the heirs as parties, a decree may be rendered determining the status of the deceased heir as well as the others. Such a decree will not be void on the ground that the same party is both the complainant and a defendant. Especially will it not be held void when collaterally attacked by one of the heirs who has for years acquiesced therein.

Decrees. Judgments. Set-off. Equity. Administrators and Executors. Before Judge Wellborn. White Superior Court. October Term, 1881.

Groves, ordinary, for use, vs. Williams, administrator, et al.

Reported in the decision.

C. H. SUTTON, for plaintiff in error.

M. G. BOYD, for defendants.

SPEER, Justice.

This was a suit brought in White superior court in favor of the ordinary for the use of A. J. Nichols, assignee, against the defendants on an administrator's bond, given by the defendants, one as principal and the other as surety on the estate of Moses Horshaw, late of Habersham county, deceased. The declaration contained two counts. The first alleging a breach of said bond, because the principal administrator had failed to pay the amount of a decree recovered against him by M. M. Horshaw, and alleging the issuance of a fi. fa. and a return of nulla bona thereon, and which had been duly assigned to Nichols, the usee of plaintiff; said decree amounting to \$484.41, dated 20th of April, 1867, and fi. fa. issuing dated 28th of November, 1874. The second count alleged a general devastavit, charging Williams, as administrator, with having taken possession of the estate of his intestate, sold and converted proceeds to his own use, and his failure to pay over to plaintiff the amount due M. M. Horshaw, under said decree, and which had been assigned to plaintiff.

The defendants filed pleas of the general issue and certain special pleas in defence. On the trial of said cause, the jury, under the evidence and charge of the court, returned a verdict for the defendants. Whereupon the plaintiff made a motion for a new trial, which was overruled, and he excepted. The grounds of the motion were:

- (1.) The court erred in not striking defendants' special plea.
- (2.) The court erred in admitting in evidence the fi. fa. in the case of E. P. Williams, administrator, vs. Sarah McClure, widow and heir of A. C. Horshaw.



## SUPREME COURT OF GEORGIA.

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(3.) That the court erred in charging the jury as follows: "That if more than seven years had run from the time of the rendition of the decree in the case of E. P. Williams vs. the heirs of Moses Horshaw, rendered in Habersham superior court, the same was dormant, and could not be set up or enforced in this way without being first renewed by motion or scire facias."

The special plea which the court refused to strike on motion of plaintiff, in substance, alleged: "That the defendant as administrator, obtained a decree in Habersham superior court in the year 1867 against said plaintiff, and the other heirs at law and distributees of said Moses Horshaw, deceased, for the sum of \$5,315.64, one-eighth part of which the said plaintiff's assignee was and is liable for and due to this defendant as administrator aforesaid, which decree and all other proceedings connected with the same is now here in court shown and legally certified, and by the terms of said decree it was provided that in the event said Alonzo L. Horshaw's estate (he being one of the deceased heirs of M. Horshaw) should be insufficient to pay off to this defendant as administrator of M. Horshaw said sum of money in full, as mentioned in said decree, then and in that event said plaintiff's assignee should account and pay over his pro rata share of said deficit. Further defendant averred, that in November, 1877, in the superior court of White county, he, as administrator, obtained a judgment against Sarah McClure, the former wife and widow of said Alonzo Horshaw, for the sum of \$3,025.00, and \$66.00 for costs, and sold out all the property of said Alonzo M. Horshaw, deceased, for the sum of \$2000.00, leaving a balance of \$2,000.00 or other large sum of money due and owing by said plaintiff's assignee to this defendant as administrator of M. Horshaw, and which sum he pleads as a set-off, and prays the same may be allowed."

Did the court err in refusing to strike this special plea, is the first error assigned in the motion. The record disGroves, ordinary, for use, vs. Williams, administrator, et al.

closes that Moses Horshaw, defendant's intestate died in 1850, that defendant became his administrator, and as such in 1866 filed his bill against the heirs at law to settle said estate, and by a decree under that bill some of the heirs were indebted to the administrator, and that the administrator was indebted to some of the heirs, and among them to Melvin M. Horshaw \$484.49. the decree settling said estate it was provided "that if the estate of Alonzo L. Horshaw, one of the heirs at law (but now deceased) should prove insolvent, that then the other heirs of Moses Horshaw should contribute pro rata to make up said deficiency." Afterwards defendant, as administrator of Moses Horshaw, recovered a judgment against the estate of Alonzo L. Horshaw, and after selling out the whole estate there was a deficiency and balance due on the judgment of about \$2,000.00 unpaid, and insolvent, and for his pro rata share of said sum it was claimed Melvin M. Horshaw and his assignee were liable to the administrator, and it was to set-off this liability the plea was filed.

The decree under which this assignee sought to recover of this administrator and his surety on his bond did find an amount due Melvin M. Horshaw by the administrator. of \$484.49; but the same decree provided that if the estate of Alonzo L. Horshaw should fail to respond to its indebtedness in full, each heir at law, including the plaintiff, should respond pro rata to pay this deficiency. We see no good reason why, under the plea filed, this proof could not be made at law, and thus the claim sought to be recovered by plaintiff might not be abated or reduced by the pro rata share of the deficiency, for which, by the terms of the decree, he was liable to the administrator. We infer this decree of \$484.40 in favor of plaintiff vs. the administrator was based upon the presumption that the estate of Alonzo L. Horshaw was solvent and would pay in full the debt due by it to the estate of Moses Horshaw: but in the event it failed so to do, then in effect Groves, ordinary, for use, vs Williams, administrator, et al.

the recovery had against the administrator was to be reduced to the extent of said deficiency, to be charged against each heir ratably. It is true this deficiency might have been ascertained by a supplemental proceeding, and an amendment of the decree in which it is now left uncertain and contingent; but when suit is brought to recover the amount due on this decree against the administrator and his securities, why may not a court of law, by way of plea, ascertain and apportion this deficiency and thus settle these issues by one trial between these parties?

We see no error, therefore, in the court overruling the demurrer to this special plea, and this also disposes of the error assigned in the second ground of the motion; for if the plea was maintainable at law, then it follows the evidence offered under it was admissible that went to show the deficiency for which the plaintiff was ratably liable.

2, 3. Did the court err in holding and charging the jury as complained of in the third ground of the motion, "that the decree of the plaintiff vs. the defendant as administrator, if rendered in April, 1867, and no fi. fa. issued thereon until November, 1874, the same was dormant and could not be enforced unless revived?"

It will be noted that this suit to recover on this administrator's bond rested upon a *devastavit* alleged to have been committed by failing to pay this decree upon which a return of *nulla bona* was made.

Section 2914 of the Code declares, "no judgment hereafter obtained in the courts of this state shall be enforced after the expiration of seven years from the time of its rendition when no execution has issued upon it."

A dormant judgment before the term expires for reviving it, is and has been so held by this court to be evidence of debt; but one which can not be enforced, only after revival or action of debt thereon. Still it is, if the right to revive or sue upon it has not been barred, evidence of an indebtedness. 7 Ga., 393; 8 Ga., 351. But to establish a devastavit against an administrator and his

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security in a suit upon his bond, a mere evidence of indebtedness does not suffice; the plaintiff must go farther, and if he is relying upon a dormant judgment as such evidence he must show either an inability or refusal on the part of the administrator to pay, and if he relies upon the return of *nulla bona* on the dormant judgment or f. fa. therefrom, it should appear that such return was made before the judgment became dormant. In this case the seven years expired in April 1874, and the judgment became dormant, and the return made thereon by the officer was made in January, 1875, at a time when his return was void and of no effect.

We do not think, therefore, the charge of the court complained of was error under the proofs contained in the record. This dormant judgment without any entry of nulla bona entered before dormancy, was no such evidence of devastavit as would, without more, authorize the plaintiff to recover. 8 Ga., 351.

4. It is further insisted by counsel for plaintiff in error, that so much of the decree in favor of E. P. Williams. administrator of Moses Horshaw, against himself as administrator of A. L. Horshaw, as to the latter estate is void, since the same person cannot be complainant and defendant in the same suit. While this may be true as a general proposition, yet it is not true in legal contemplation that the parties here are the same. E. P. Williams, administrator of Moses Horshaw, is a different party from E. P. Williams, administrator of A. L. Horshaw. The one is under oath and bond faithfully to administer the estate of Moses Horshaw, and the other is under like bond and oath to administer the estate of A. L. Horshaw. In settling estates it may be a necessity under the direction of a court of chancery, for the same person to represent interests of seeming conflict. From this record this bill was filed to settle the estate of Moses Horshaw among the heirs. Alonzo L. Horshaw was an heir and also a debtor, and he was a necessary party to the bill, Farris vs. Wells.

and under the supervision of a chancery court we are not prepared to hold that a decree thus rendered would, upon a mere suggestion years afterwards, be void. On the other hand, in the absence of all allegations or evidence of fraud, mistake or collusion, we see no good legal reason to declare it void upon a mere suggestion or motion, and especially when the assignor of plaintiff in error was a party to the same decree his assignee is claiming a benefit under.

Let the judgment below be affirmed.

## FARRIS vs. WELLS.

Where a note, draft or check is made payable to order, the indorsement of the payee is necessary to transfer the legal title to another. Without such indorsement, the transferee takes the paper as a mere chose in action, and to recover upon it must aver and prove the consideration.

Contracts. Actions. Indorsement. Written Instruments. Before Judge HILLYER. Fulton Superior Court. Fall Term, 1881.

Reported in the decision.

- E. A. ANGIER, for plaintiff in error.
- J. T. PENDLETON; J. A. ANDERSON, for defendant.

CRAWFORD, Justice.

R. C. Farris brought suit against C. W. Wells on two bank checks—each one calling for the sum of two hundred and fifty dollars—drawn by himself (Wells), against the Gate City National Bank of Atlanta, payable to his own order, but not indorsed.

The declaration alleged that the said checks were delivered to the plaintiff by the defendant, and upon preIrwin vs. Ruley.

sentation at the bank for payment were refused on the ground that the said defendant had notified the bank not to pay the same.

It was further averred that the said defendant had also refused to pay the same although thereunto frequently requested so to do.

The case was dismissed on demurrer, and the plaintiff excepted.

We know of no exception to the rule that where an instrument is made payable to order, the indorsement of the payee is necessary to transfer the legal title to another. Without such endorsement the transferee takes it as a mere chose in action, and to recover upon it must aver and prove the consideration. Nothing of the sort being averred, the demurrer was well taken and properly sustained. Daniel on Neg. Ins., §664; Story on Promissory Notes, §121; Story on Bills of Exc., §200.

Judgment affirmed.

#### IRWIN vs. RILEV.

- The court below was right in holding that the verdict was proper as to two of the defendants.
- 2. While the judge of the superior court is clothed with ample power to grant or refuse new trials on terms, yet where the suit and recovery was against three as joint contractors, the judge could not refuse a new trial on condition that the plaintiff should release and cancel the judgment as to one of the defendants, as to whom the evidence failed to support the verdict.
- 3. The power of the supreme court is more ample as to moulding the case in the court below. This court may award such order and direction to the cause in the court below as may be consistent with the law and justice of the case.
- (a.) The verdict and judgment being right as to two of the defendants, and unsupported as to the third, it is therefore ordered that a new trial be granted, unless the plaintiff will dismiss his suit as to the last named defendant, and in that event that it be refused. The question of contribution between him and his co-defendants is left open.



Irwin vs. Riley.

New Trial. Practice in Superior Court. Practice in Supreme Court. Before Judge STEWART. Rockdale Superior court. August Term, 1881.

Reported in the decision.

A. C. PERRY; A. C. McCALLA, for plaintiffs in error.

GEO. W. GLEATON; J. N. GLENN, for defendant.

:SPEER, Justice.

Riley, the defendant in error, brought his action against Willis Irwin, H. W. Hammock and William I. Turner, on account, for the sum of three hundred dollars for work and labor done and performed by him for defendants in building a bridge over Yellow river in Rockdale county. Under the evidence and charge of the court the jury returned a verdict for the plaintiff for the sum of two hundred dollars, with interest.

The defendants made a motion for a new trial on various grounds, as set forth in the record: That the verdict was contrary to law, to the charge of the court, to the evidence, weight of evidence, and for certain errors of the court as set forth in his charge to the jury. Also that there was no evidence to support the verdict as to Wm. I. Turner, one of the defendants.

On the hearing of the motion for new trial, the judge entered a judgment thereon as follows: "A new trial is granted, unless plaintiff will write off, release and cancel, the judgment obtained against William I. Turner. If plaintiff should do this in ten days from this date, then as to the other defendants a new trial is refused."

Within ten days from said judgment plaintiff complied with the conditions imposed by the court by releasing in writing (of record) the defendant, Wm. I. Turner, from said judgment, whereupon the other two defendants, Irwin and Hammock, excepted, and assigned as error the

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judgment of the court refusing said new trial, and excepted also to the terms on which said new trial was refused.

We find no error in the court's refusing a new trial as against these plaintiffs in error on any of the grounds set forth preceding the seventh ground of the motion for a new trial, and we fully concur with the court that there was no sufficient evidence to sustain a verdict against Wm. I. Turner. But the question is presented, whether the court could refuse the new trial as to the other defendants by imposing conditions, such as he did, upon the plaintiff to discharge Turner from the judgment.

That the court has large and ample authority, resting in its sound, legal discretion, either to grant or refuse new trials on terms, is so firmly established by precedent and practice that it cannot be questioned.

The terms on which new trials are usually granted or refused are distinguishable into two kinds: one where costs only are imposed, the other where the court superadds to the payment of costs other conditions with reference to the pleadings, or the merits, or the probable result. Graham N. T., 567. The terms imposed on setting aside or refusing to set aside, in addition to costs, are either ordinary or extraordinary.

The extraordinary terms arise out of the merits of the case, the relative situation of the parties, the probable consequences of delay, the advantage or disadvantage of delay, or from opening the whole case and putting the entire merits afloat, and to protect the rights of the party in possession of the verdict, the court may insert stipulations in the rule, and for this purpose will look into the case. I Graham on New Trials, 604; I Bos. and Pal., 158. While the court is thus clothed with large discretion as to the terms it can impose in granting or refusing new trials, in so doing the interest of all the parties should be carefully guarded. We concur in the opinion of the court below that there is no legal ground for dis-

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turbing the verdict rendered against Irwin and Hammock, and we also hold that the verdict against Turner was unsupported by the evidence and should not be allowed to stand. But in relieving Turner, one of the defendants, we do not think the justice or law of the case demand that a new trial should be had vacating the verdict against the other two defendants; that would operate unjustly to the rights of the plaintiff. The court below entertaining these views sought to mete out justice to all parties by refusing the new trial as to Irwin and Hammock on condition that plaintiff would release and discharge Turner from the judgment, and so ordered. We question the authority of the circuit judge to impose such terms. The discharge of Turner by the plaintiff as a co-defendant in a joint judgment, might, by operation of law, discharge the other two defendants, and thus the recovery of plaintiff would be barren of results. The consent plaintiff gives to the discharge of one joint defendant under the conditions imposed by the court might prove more disastrous than to submit to a new trial.

But the authority of this court, as conferred by statute, in the judgments here pronounced is not so limited. In any cause tried here, it is within its power "to award such order and direction to the cause in the court below as may be consistent with the law and justice of the case." Code, §4284.

In the case of *Davis et al. vs. Gurley*, 51 Ga., 74, which was an action for trespass brought by Gurley against Charles Davis, William Davis, Dine Davis and William Morgan, as joint trespassers, for damage done to plaintiff's stock, the jury returned a verdict against all the defendants. The court said, on motion for new trial and writ of error to this court: "There is no evidence in the record to justify the finding against any of the defendants except Charles Davis—nothing connecting the other three defenddants with the killing, either by acts or threats. In our opinion the verdict can be sustained against Charles Davis

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only by the evidence. Under the authority given to this court by section 4284 of the Code, we reverse the judgment of the court below and order a new trial, unless the plaintiff will remit from his judgment the sum of \$114.00, and dismiss the suit as to William Davis, Dine Davis and William Morgan."

So in the present case there being, in our opinion, evidence sufficient to sustain the verdict as to Willis Irwin and H. W. Hammock, but insufficient as to William I. Turner, we reverse the judgment of the court below in the terms as pronounced by him, and order a new trial in said case as to all the defendants, unless the plaintiff will dismiss his suit as to William I. Turner; on the plaintiff complying with this order, the judgment of the court refusing a new trial as to Willis Irwin and H. W. Hammock will stand affirmed.

This disposition of the case as to Turner also leaves the question open as between him and his co-defendants, as to his liability to them for contribution, if they should pay the judgment recovered.

While the judge below sought to attain the same conclusion at which this court has arrived, and grant the relief to the defendant, Turner, in the mode adopted by him, yet we think it best to pursue the precedent as fixed by this court in the case cited, as being the better mode under the law and facts.

Judgment affirmed on terms.

## THE GEORGIA SOUTHERN RAILROAD COMPANY vs. NEEL.

- 1. An employe of a railroad company who has been injured by its negligence, without fault on his part, may recover general damages on account of pain, physical injury and general depreciation of power to labor, although no proof of the value of his services as such employe, or in other business, may be made.
- (a.) If it were necessary to allege the value of services of a person injured by a railroad, the point should be raised by demurrer.
- 2. The question of damages is one for the jury, and the judge should

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not interfere with the verdict as excessive in amount unless the damages found are so excessive as to justify the inference of gross mistake or undue bias. Such is not the fact in this case.

(a.) This court will be more reluctant to interfere with a verdict as awarding excessive damages, where the point was not distinctly made in the court below, but was brought up under the general exception that the verdict was contrary to law and evidence.

Damages. Negligence. Railroads. Practice in Supreme Court. Before Judge UNDERWOOD. Floyd Superior Court. September Term, 1881.

Reported in the decision.

SEABORN WRIGHT; MAX MEYERHARDT; H. C. PEE-PLES, for plaintiff in error.

A. R. WRIGHT; C. N. FEATHERSTON, for defendant.

CRAWFORD, Justice.

A. J. Neel sued the Georgia Southern Railroad Company for damages resulting to him on account of the carelessness and negligence of the said company, in allowing the top round of the ladder by which he, as brakeman, was required to ascend and descend the cars to perform his duties, to become loose and unsafe, so that in attempting to perform his duties by descending the said ladder, he was thrown with great violence to the ground, a distance of ten feet, thereby greatly bruising his body, spraining his ankle, damaging his foot, and causing him great mental and bodily pain and suffering to his damage five thousand dollars.

The proof showed that he entered the service of the company on the day in which he was hurt; that he was on the top of the car, and about to descend the ladder, when, owing to the fact that the screw which fastened the first round was loose, it pulled out and he fell; his body was bruised, his foot and ankle very seriously if not

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permanently injured; he was confined to his bed for one month; suffered very much, and still suffers to a great extent; cannot walk as well as before the injury; lost a year's time; was forty-one years old, stout and healthy; capacity for work diminished one-third, and his physician's bill was twenty-five dollars.

The jury gave him a verdict for one thousand dollars for his damages.

A motion was made for a new trial, the only grounds of which necessary for consideration here are, that the verdict was contrary to evidence and contrary to law.

1. Under these grounds it is insisted that the verdict has no evidence to support it, and is, therefore, contrary to law. That is to say, there is no proof of the value of the services of the plaintiff as brakeman, none having been agreed upon, and no proof as to the value of his services if employed at any other work. The question made, therefore, is, whether one can recover damages who has shown that by reason of a defective ladder on a car which he had to go down in the performance of his duty he fell, and was so injured that he was confined to his bed for one month, disabled a year from work, suffered great mental and bodily pain, incurred a physician's bill of twenty-five dollars, was unable to work, or walk as well as before the injury, without proof of the amount of the wages he was to receive, or the value of his services in other pursuits.

It will be observed that the plaintiff, in his declaration, does not allege the value of his services, but puts his case on the damages which he sustained by reason of the injury to his body, his pain and suffering, his confinement to his bed, and the actual outlay of expense in and about his being cured. It doubtless would have been more satisfactory to the judge and jury below, if the plaintiff had alleged and proved the value of his services to the road as a brakeman, as well as what his labor was reasonably worth in other pursuits, but there was no demurrer to the

declaration, and the case went to the jury upon the general allegations therein contained, and the proofs submitted thereunder, and it is too late after verdict to make the objection.

2. It is further urged before this court, that the damages found by the jury were excessive, and unauthorized by the evidence.

The question of damages being one for the jury, the court should not interfere, unless they were so excessive as to justify the inference of gross mistake, or undue bias. In this case the plaintiff in error made no complaint of the amount of the verdict, and asked no ruling thereon by the judge below. We think that the question of the excessiveness of the verdict should have been passed upon by the judge below. Where it is not done, we will not say that it will not be considered here, but we do say that it would require a very strong case to make us send it back, when the judge below has not passed upon it, and the point is raised here for the first time.

This case not being within that rule, and there being no such ground set out in the motion for a new trial, we decline to interfere with the finding of the jury.

Judgment affirmed.

## HANVEY vs. THE STATE OF GEORGIA.

- I. Although a juror may have been accepted and sworn in chief, if before the case proceeded or the panel was completed he presented an excuse on the ground of sickness, there was no error in excusing him and proceeding with the cause; especially so where the defendant's counsel agreed to submit the question of his excuse to the court.
- 2. Voluntary drunkenness is no excuse for crime. A charge to this effect, but with the addition that it might be considered by the jury, like any other fact, to shed light on the transaction, was quite as favorable to the prisoner as the court could legitimately give.
- Witnesses who have not been called and put under the rule may
  testify in rebuttal of a prisoner's statement, where the court is satisfied that the ends of justice require it.

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- (a.) That the defendant has discharged his witnesses before testimony in rebuttal of his statement has been introduced, is his own fault. Especially is this not a ground for a new trial where no evidence was introduced on behalf of the defense, and it does not appear that the defendant had any witnesses.
- 4. If a deadly weapon be used in a homicide in the usual and natural manner in which such weapon would produce that result, the presumption of an intention to kill would arise. Aliter if the weapon were used in a manner not naturally calculated to produce such result.
- (a.) Such is the substance of the charge, when taken in connection with its context, and it was not error.
- 5. In order for newly discovered evidence to be a ground for a new trial, it must appear that it could not have been discovered before the trial by the use of reasonable diligence.
- (a.) Mere words, threats, menaces or contemptuous gestures are no considerable provocation in the eye of the law, and if proved would not justify a homicide.
- (b.) When the testimony of newly discovered witnesses is made a ground of a motion for new trial, affidavits as to their residence, character and credibility should be produced.

Murder. Jurors. Practice in Superior Court. Criminal Law. Before Judge HARRIS. Carroll Superior Court. October Term, 1881.

Reported in the decision.

REESE & ADAMSON; T. W. LATHAM, for plaintiff in error.

H. M. REID, solicitor general, by brief; COBB & BROWN; W. P. Cole, for the state.

CRAWFORD, Justice.

The plaintiff in error was charged with murder, and found guilty; he submitted a motion for a new trial which was overruled, and that ruling is the error alleged in this case.

1. It is complained that the judge excused a juror who

had been sworn "in chief." The record shows that after he had been accepted and sworn, he presented the certificate of a physician that he was unable to serve; the attention of counsel for the prisoner was called to the fact, who agreed that the judge might hear the juror's excuse under oath, which was done, and the juror excused. There was certainly no error in discharging the sick juror, and proceeding with the cause, and especially when prisoner's counsel consented to submit the question of the juror's condition to the decision of the judge, and before the case was submitted or the panel was complete.

2. The second ground of error alleged is, that the judge refused to charge in substance, that if the defendant used a weapon which he casually obtained, and was drunk at the time, that then the jury could look to his drunkenness to ascertain whether the killing was malicious. There were other grounds of exception arising upon the refusal of the judge to charge upon the subject of drunkenness, as to the effect which it should have upon the finding of the jury. They were all refused by the judge, and properly so under the Code and the decisions of this court. That voluntary drunkenness shall not be an excuse for crime is the written law of this state, and the sooner that it is recognized and observed, the better it will be for all over whom it is to be enforced.

One who voluntarily kills, must meet the demands of justice and of law with some other excuse than that of drunkenness. In the language of Justice Bleckley, in Marshall vs. The State, 59 Ga., 154; "To be too drunk to form the intent to kill, the slayer must be too drunk to form the intent to shoot."

In this case the judge charged the jury that voluntary drunkenness was no excuse for crime, and would not reduce the killing from murder to any lower grade of homicide, but that it was a fact that might be considered, like any other fact, to shed light, if it could do so, upon the transaction. This goes as far as has ever been authorized

by any of the rulings of this court, and is quite as favorable to the accused as any of the more recent decisions would allow.

3. The next assignment of error is, that after the state had closed, and the prisoner had made his statement, witnesses in rebuttal were allowed to testify who had not been "put under the rule," and who had remained in the court-house during the trial, and this after the defendant's witnesses had been discharged.

Witnesses who have not been "put under the rule" may testify in rebuttal, where the court is satisfied that the ends of justice require it. It will take proper care always to have the witnesses of either party examined out of the hearing of each other upon request, but to exclude any or all who may have happened to be in the court-room pending the trial, and who had not been sworn and put under the rule, would be extending the rule beyond its reason.

Upon the latter branch of the ground, that the defendant's witnesses had been discharged, it is only necessary to say that he offered no testimony whatever, and it does not appear that he had any witnesses; if, however, he did have, and discharged them, knowing that the state had the right to rebut his statement, it was a fault of his own, and not that of the state.

· 4. The next ground of error assigned is because the court in his charge to the jury used the following language: "If a deadly weapon is used to accomplish the killing, which is likely to produce death when used in the manner the proof shows it was used, the law presumes that the person using it intended to kill."

Taking this sentence by itself, it would doubtless be construed to have reference to the particular case then being tried, and to the proof which had been introduced. But the preceding part of the charge clearly excludes all idea of such construction. The judge had defined murder and was defining malice, and illustrating how the jury

might ascertain whether it existed, and in doing so he said: "Whenever a killing by unauthorized violence is shown, the law presumes it was done with malice aforethought and denominates it murder, unless the accompanying proof shows that it was done without malice. authorized killing be shown, and the accompanying proof does not show it was done without malice, it then devolves upon the accused to show that it was done without malice. If a deadly weapon is used to accomplish the killing, which is likely to produce death when used in the manner the proof shows it was used, the law presumes that the person using it intended to kill. This presumption may be removed by proof. Express malice is the deliberate intention," etc. There can be no question as to the meaning of the sentence excepted to, which was, that if a deadly weapon were used in the killing, and the proof showed that it was used in the manner in which such weapons were used to kill, then the law presumed that the person so using it intended to kill. That is to say, if a man used a pistol in the killing, and fired it, and thus killed the deceased, the presumption of the law was that he intended to kill, because he used it in the manner such weapons were used to kill. But if he should strike the deceased with the barrel and kill him, that not being the manner in which such deadly weapon was used to kill, then the presumption would not arise. And so, if with a bowie knife, dirk, or pocket knife, he should strike the deceased with the handle and thus kill, this not being the manner in which such deadly weapons are used to kill, the presumption would not arise. This was clearly the meaning of the judge, yet being inaptly expressed, learned counsel have sought to make it apply to the particular case on trial, and thus secure another trial for their unfortunate client.

- 5. Another assignment of error is made on the refusal to grant a new trial on newly discovered evidence.
  - A. J. and J. W. Robinson, two of the persons present

at the homicide, give affidavits to the effect that Bird, one of the state's witnesses, was inside the grocery with his back to the door, and could not have seen the difficulty; that Allen, another of the witnesses for the state, was drunk, and Harris, who also testified, was not present, or if he were they did not see him. They further say that they heard McMullin, the deceased, give Hanvey the damned lie, who said to him he must not do that; he would not allow it; when McMullin replied that he had the best pistol that ever fired, "and if you (meaning Hanvey,) don't like it I will blow your damned brains out," and thrust his right hand into his breeches' pocket as if to draw a pistol, whereupon Hanvey, who was near him, instantly struck him, and he fell from his horse. They state, also, that about a half an hour before the difficulty McMullin was abusing Hanvey in the grocery, who said to him, "look here, I want you to go off and let me alone," that McMullin soon went out, mounted his horse and, riding up in front of the door, said that his horse could outrun anything in three states, which was replied to by Hanvey's saying that he could find one to beat it, and then the difficulty followed as they had stated it.

There are three good and sufficient reasons why this newly discovered evidence should not entitle the defendant to a new trial. The first is that these two persons were known to have been present at the homicide and witnessed the difficulty, and that there were only a very few who were there, and yet there was no diligence whatever shown to procure their testimony. Besides, one of them appears to have been present at the trial, and was not sworn because he disclosed nothing, as is shown by the affidavit of Mr. Latham, that was material or important to the defendant.

The second reason is that the testimony, if introduced, would not change the verdict by reducing it from murder to manslaughter, or justifiable homicide. "Mere words, threats, menaces, or contemptuous gestures, are no con-

siderable provocation in the eye of the law and, therefore, where they cause a homicide malice shall be implied." In the case where these words were used, 40 Ga., 211, by Chief Justice Warner, the deceased had put his hand upon his hip and said, "I will shoot, you son of a bitch, if you touch my woman." The most that can be said in this case is, that the witnesses would swear that McMullin said he had the best pistol that ever fired, and if you, meaning prisoner, don't like what I say, I'll blow your damned brains out, thrusting his hand into his breeches' pocket. It was but a threat with a gesture, just as stated in the case cited, and in which that eminent judge further said, "that this court will avail itself of the present occasion to announce to the public from this bench, with all the emphasis which its judgment can impart, that provocation by words, threats, menaces or contemptuous gestures, will in no case be sufficient to free a person who kills another by shooting him, from the guilt and crime of murder."

The third and last reason wherein this ground of newly discovered evidence is defective, is that: "It should be known, not only who the witness is, but where he resides, what is his character, and who are some of his associates. He should be brought out, so to speak, and be exhibited in day-light. Affidavits should be adduced as to his character and credibility." This doctrine was laid down in the 55th Ga., 702, and in the 56th Ib., 405, and it is reaffirmed in this case.

There were other questions made in the motion for a new trial, but none that have sufficient merit to reverse the court below. Unfortunate as it is for the defendant, the record shows that he has been tried and condemned according to the law of the land, and painful as it is to this court to record it, that condemnation must stand affirmed.

Judgment affirmed.

Crusselle vs. Reinhardt, administrator.

### CRUSSELLE vs. REINHARDT, administrator.

- I. Where two parties purchased certain land, paying one-third of the price, and taking bond for titles, and one as agent for the other sold to a purchaser who bought bona fide and on the assurance of the vendors that the title was good, and without notice that any part of the purchase money was unpaid, if subsequently the original vendor sued for the balance of the purchase money, obtained judgment and levied on the land, and the last purchaser thereupon paid the amount of the f. fa., took a transfer of it and also a deed from the plaintiff, he could nevertheless proceed to enforce the fa. fa. against his vendors.
- 2. The verdict is supported by the evidence.
- 3. Where a defendant in f. fa. has sought an injunction against it, alleging that he was jointly interested with his co-defendant in the consideration of the debt, after the dismissal of the bill he will be estopped by his solemn admission in judico from setting up by affidavit of illegality that he was a mere security and had been discharged.
- 4. The case appears to have been brought to this court for delay only, and damages are awarded against the plaintiff in error.

Contracts. Title. Executions. Estoppel. Before Judge STEWART. Fulton Superior Court. October Term, 1881.

Reported in the decision.

- R. ARNOLD, for plaintiff in error.
- S. WEIL, for defendant.

SPEER, Justice.

The record discloses the following facts:

In the spring of 1866 Crusselle, the plaintiff in error, and one Gullett, purchased from Evans, administrator, at public sale a city lot in Atlanta for the sum of \$500.00, one-third to be paid in cash, and the balance in twelve months. That the cash payment was made, and Gullett

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and Crusselle gave their joint note for the balance (\$333.33) due at twelve months; Gullett first signing said note and Crusselle signing as security; Evans at the time giving bond for titles conditioned to make titles to Gullett and Crusselle on the payment of their note. That soon after this purchase, Crusselle, representing himself as agent for Gullett, negotiated a trade of a portion of said lot (Gullett having previously sold a portion to a colored man for \$200.00) to Keith. That Keith, wishing to be certain about the title before he purchased, sent one McKenny, as his agent, with Crusselle to the home of Gullett, at Griffin, to investigate the title of Gullett to the lot. That on an interview had there. Gullett and Crusselle both assured McKenny that the title was al right, and on the faith of these representations Keith purchased the lot of Crusselle, as agent of Gullett, and paid him for it, in property and money, the agreed price of \$500.00. That at the time of said sale to Keith, Gullett and Crusselle only held Evans' bond for title. with one-third of the purchase money paid. Keith, in ignorance of the title being defective, went into possession and improved the lot. When the note for the purchase money owing by Gullett and Crusselle became due to Evans, he brought suit and obtained a judgment, and levied on the house and lot to realize his money due. Keith, to protect his title against the judgment, advanced the amount due on the judgment to Evans and took a transfer of the same. Evans also executing him a deed to the property he (Keith) had previously purchased of Gullett. The record further discloses that in 1872 Crusselle, the plaintiff in error, filed his bill for injunction and relief against Reinhardt, the administrator of Keith, in which he alleged "that in February, 1866, Gullett himself purchased at administrator's sale a city lot (this lot) in Atlanta from one Evans, as administrator, for the sum of five hundred dollars, paying one third of the purchase money in cash and giving their joint promissory note for the reCrusselle vs. Reinhardt, administrator.

maining two-thirds due at twelve months after date, taking Evans' bond to make titles on payment of balance due to him, and which bond was exhibited to The bill alleged that Gullett, in 1866, sold said lot to C. F. Keith without the knowledge and consent of complainant. That as soon as he was informed of said sale, and before Keith had paid for the said lot, he notified Keith that he, the complainant, owned and claimed a half interest in said lot, sold to him by Gullett. and that he was not a partner in said property with Gullett, but his interest was one-half therein. That he had received no part of the consideration paid Gullett by Keith. He further alleged that Evans had obtained judgment on the note given by Gullett and himself for the balance of purchase money given to him, that he had levied on the lot and Keith had paid off the fi. fa. the day before the sale, and Evans had made Keith a deed. He therefore prayed an injunction against the enforcement of the fi. fa., and for general relief, etc. It further appears that this bill, after being sworn to and filed, was subsequently dismissed. It further appears, afterwards when the defendant in error, Reinhardt, administrator, had the property of Crusselle, in 1875, levied on by virtue of the fi. fa. which his intestate held as the transferee of Evans, administrator, against Gullett and Crusselle for the balance of the purchase money, he (Crusselle) filed his affidavit of illegality to said fi. fa's. proceeding, on the ground that he was security only on said fi. fa. for Gullett, and that said Evans, administrator, had released deponent from all liability on the note, the foundation of said judgment and fi. fa. "That said Evans, to whom said fi. fa. had originally belonged, and the consideration of which was the lot sold to Gullett, had since sold the same to Keith, and had since received the balance of the purchase money due, thereby releasing deponent from said fi. fa."

There is also an averment of payment of said fi. fa. made by Gullett to Evans since the judgment was obtained.

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Under the evidence and charge of the court the jury on the issues presented in said illegality found a verdict for the plaintiff in fi. fa. A motion for a new trial was made and overruled and defendant excepted.

- I. We think the law was correctly presented by the court to the jury under the facts of this case when he charged them, "but if you find from the evidence that Keith bought this lot from Crusselle, as agent for Gullett, and Keith at the time believed that the title was perfect and did not know that any part of the purchase money was unpaid—then Keith, notwithstanding Evans made him a deed directly to the land, would also have the right to take a transfer of this execution, and his representative would have the right to collect this execution out of Crusselle, and in that event you would find that the execution do proceed."
- 2. There being abundant evidence to support the verdict under this charge, we find no error either in the verdict or in the judgment refusing to set it aside, for any of the grounds stated in the record.
- 3. Moreover, as to one of the grounds in the affidavit of illegality in which defendant in fi. fa. sets up that he was only security on the fi. fa. for Gullett, and had been discharged by the act of Evans; it appears from the bill he filed touching this fi. fa. that he alleged he was a joint purchaser with Gullett of this lot from Evans, and thus was jointly interested in the consideration of said note on which this judgment was rendered; and this solemn admission in judico made by this plaintiff in error, we think estops him from now setting up the fact that he was a mere security on this note, or from pleading any release or discharge from the same on that account. Code, §3753.
- 4. Counsel for defendant in error has insisted before us that this writ of error was brought here for delay only, and that damages should be assessed against the plaintiff in error.

There were but two grounds of error insisted upon be-

fore this court-one that the verdict was contrary to the charge of the court on the subject of Crusselle being the security of Gullett, and his being discharged by reason of his risk being increased by the act of Evans. The other was that the verdict was against the charge of the court as heretofore referred to. As to the first charge, we do not think, as we have said, that the plaintiff in error, from the evidence, was entitled to make the question of his securityship under the averment he made in the bill he filed. As to the second ground, we think the verdict was not only in accordance with the charge but the evidence demanded it. Under our view of the law and facts of this case, we see no merit in the defence offered to the proceeding of this f. fa. by the defendant in the court below, and we are constrained to conclude that this writ of error was brought here for delay only, and we feel it to be our duty to award damages against the plaintiff in error, as provided for in section 4286 of the Code. 41 Ga., 125; 42 Ib., 232; 46 Ib., 268.

Judgment affirmed with damages.

## THE GEORGIA RAILROAD COMPANY vs. Cole & Co.

- I. Where goods are delivered to the first of a connecting line of rail-roads to be shipped to a given destination by a specified route, a delivery by the first railroad to another railroad which forms a part of a different route is a breach of the contract, and a conversion which renders the first road liable for the value of the goods. If they be delayed by such delivery, or damage result, the first road may be held responsible therefor.
- Mere acceptance of a portion of the goods shipped by railroad, on arrival at their destination, is not a waiver of all claim for loss resulting from delay.
- 3. With hesitation we refuse damages on the ground that this case was brought up for delay only. We base our refusal on the fact that the question of the result of the receipt by the shipper's agent of some of the goods on arriving at their destination contains some merit.

Railroads. Damages. Negligence. Contracts. Practice in Supreme Court. Before Judge CLARK. Fulton Superior Court. October Term, 1881.

Reported in the decision.

HENRY HILLYER; HOPKINS & GLENN, for plaintiff in error.

P. L. MYNATT, for defendant.

SPEER, Justice.

The defendants in error brought their action to recover damages against the plaintiff in error for failure to deliver certain goods entrusted to them. They alleged "that in October, 1876, they entrusted plaintiff in error as a common carrier with certain goods, at their depot, in said county, to-wit, six boxes of trees, and three boxes and one bale of trees, all of the value of ----; the six boxes were to be delivered to J. W. Baker, at Graham's, S. C., and the remainder were directed to be shipped and delivered to J. W. Baker, Kingstree, S. C., both shipments were directed to be sent via Columbia, S. C. . . . The shipments were made on the 30th and 31st of October, and marked and directed as stated. . . . The trees shipped were sprigs and sprouts for planting, and had been sold from their nurseries of shrubbery and fruit trees for that purpose to be delivered on certain days, to various persons, at the places mentioned, and said trees without again being planted would in a few days perish, and all this was well . . . When as a carrier it under known to defendant. took to carry said trees from Atlanta, Ga., to Graham's and Kingstree, S. C., as said bales and boxes were marked and directed, and the said carriers agreed to send said trees via Columbia, S. C., and the same were so marked. This being the shorter and more direct route to destination. . . . But the defendant below disregarded said in-

struction and sent them by another and longer route, and did not carry said goods or securely deliver the same as it undertook and promised, but on the contrary so negligently conducted and misbehaved in regard to said goods as a common carrier that by reason thereof the same became and were lost to plaintiffs."

The defendant below pleaded that if said goods were ever received, the same were promptly and in due time delivered in good order to the South Carolina Railroad, being the next connecting road on to Graham's and Kingstree. That said goods were incorrectly marked, and the delay, if any, was caused by this mistake of the plaintiffs below. A full compliance with their contracts by the delivery of said goods, those destined to Kingstree on the 13th of November, 1876, and those at Graham's on the 20th of November, 1876.

Under the evidence and charge of the court, the jury returned a verdict for the plaintiffs. The defendant made a motion for a new trial, and the same being refused, defendant excepted.

It appears from the evidence that three boxes and one bale of the trees were received by the agents of the plaintiffs below on the 7th of November, 1876, at Kingstree, S. C., and were opened there and distributed to the purchasers who called for them; four of the boxes destined for that point did not arrive for several days. The boxes directed to Graham's, S. C., did not arrive there till the 26th of November. These packages were all marked to their destination "via Columbia, S. C." That plaintiffs below had agents at these places of destination awaiting the arrival of the shipments at the time they were expected, and for several days after, to receive and distribute the same to the purchasers. Mr. Cole, one of the plaintiffs. testified that before these shipments were made he went to Werner, agent of the defendant below, to ascertain which was the best way to ship. Did not find him, and

went to see Selkirk, agent of the South Carolina road, but the interview was not satisfactory, and then went back to Werner's office and asked him to give witness through rates to Columbia, and he did so at 56 cents per hundred, and he then closed with him, and agreed that the goods should go via Columbia. Some of the receipts were marked "via Columbia," and others were not. also proved that the nearest route for shipment via Columbia to their destination was from Atlanta to Augusta, thence by the Charlotte, Columbia and Augusta Railroad to Columbia, thence by the Wilmington, Columbia and Augusta road to Florence, thence by the North-Eastern road to Kingstree and Graham's. It appears further, that the defendant below, on the arrival of these shipments at Augusta, delivered them in good order to the South Carolina Railroad, and by them they were shipped over their road to Charleston, a portion landing at Graham's station, on their road, and balance were transported by Charleston to Kingstree. There is no evidence that any of the goods were shipped over the Charlotte, Columbia and Augusta road to Columbia, and thence to their destination, or by Columbia, as directed by plaintiffs. But on the contrary, the witness of the Georgia Railroad and its agent testifies they went on the South Carolina road by Branchville to Charleston.

We think there was sufficient evidence before the jury to warrant them in believing that the shipments were directed to be made over the Charlotte, Columbia and Augusta Railroad from Augusta via Columbia to their destination. Take the testimony of Cole and of Werner, and we think such a conclusion reasonable, and it seems at the time to have been so understood by both parties.

1. This being the contract as we may reasonably infer from the testimony, then the delivery of these goods by the Georgia Railroad and Banking Company at Augusta to the South Carolina Railroad running from Augusta to Charleston, and sending them to Charleston (though with a

branch on its line to Columbia) was a violation of the contract and a conversion of this property, and made the Georgia Railroad liable for their value. 26 Ga., 617; 14 Ib., 283. It may well be inferred that this divergence from the line of shipment contracted for led to the loss of some of the missing goods, and also to the long delay of others which defeated in a great measure the object of shipment, and the failure to dispose of them on their tardy arrival at the points of shipment.

2. As to the agent of plaintiffs receiving from the railroad those so long delayed, on their arrival at Kingstree, we do not think such receipt would relieve the defendant below from liability. What was disposed of by this agent on their arrival (under the instructions of the court to the jury) the defendant below received credit for, and what was not disposed of and lost by the delay we think the company should pay for. It is a well settled rule, that the mere acceptance of goods on their arrival is not a waiver of loss by delay. Hutchinson on Carriers, §775.

Our conclusion, therefore, is that the Georgia Railroad has not relieved itself, under the evidence in this case, from liability by delivering these shipments to the South Carolina Railroad in good order as a connecting road, as it now seeks to do, when it appears they were shipped over said road to Charleston and not via Columbia. Their liability commenced on the delivery of the goods to them. It ceases with their delivery at destination according to the direction of the person sending. Code, §2070; 25 Ga., 231. Hutchinson on Carriers, §§199, 108.

By failing to deliver to the connecting road on the line directed under the contract and as evidenced by the marks on the packages, but delivering them to a different road to pass over a different line or route, they converted the goods and became liable on their loss for their value, whether such loss was occasioned by delay or otherwise. 26 Ga., 617; 14 Ib., 283; 8 W. H. & G., 341; Hutchinson on Carriers, §199.

Trammell vs. Woolfolk.

We think the law of the case was fairly submitted, and there being sufficient evidence to support the verdict, we decline to disturb it.

3. Counsel for defendants in error insist upon damages being assessed by this court for the reason this cause was brought here for delay only. We have hesitated whether or not under the facts of this case the claim for damages is not well founded, and we withhold them alone upon the ground in the record that as some of the trees shipped to Kingstree were received by the agents of the plaintiffs below, the question was probably a proper subject of inquiry whether the defendant below should be held liable for any of those trees thus received, and whether, as they were so received, it did not devolve upon the plaintiff below to show affirmatively that what were not sold and accounted for proved a loss to defendant. This question alone induces us to conclude the case had some merit in it and was not brought here for delay alone.

The evidence on the main issue shows in this shipment the defendant below did not follow the directions of the shipper to send the goods by way of Columbia, but they were sent by the South Carolina railroad to Charleston on their way to Graham's and Kingstree, and for this defendant below was clearly liable.

Judgment affirmed.

### TRAMMELL vs. WOOLFOLK.

- 1. The plea of usury is one regulated by special legislation. Such a plea must be complete within itself, and set forth the sum upon which the usury was paid, or to be paid, the time when the contract was made, when payable, and the amount of usury agreed upon, taken or reserved.
- 2. Questions not made in the court below will not be considered here.

Usury. Pleadings. Practice in the Supreme Court. Before Judge WILLIS. Harris Superior Court. October Term, 1881.

Trammell ps. Woolfolk.

Reported in the decision.

W. DUGAS TRAMMELL; M. H. BLANDFORD, for plaintiff in error.

McNeil & Levy; Peabody & Brannon, for defendant.

CRAWFORD, Justice.

1. J. W. Woolfolk having filed his petition to foreclose a mortgage made by C. H. Trammell, was met by a plea of which the following is a copy:

"And now comes the defendant, and for plea and answer says, that the foundation of the plaintiff's action is a certain promissory note made and executed by defendant to Hudson, Jenkins & Redd, and for the security of said note defendant executed and delivered his certain deed of mortgage, by which note and mortgage he agreed to pay said Hudson, Jenkins & Redd, for their interest for the use of three hundred dollars, which was the consideration of said note and mortgage besides legal interest, the further sum of twenty-five dollars, being the storage on fifty bales of cotton, and the said Hudson, Jenkins & Redd, never expected the defendant to deliver said fifty bales of cotton, but on the contrary said contract was usurious, and the agreement was a devise to defeat the statute against usury, and of this defendant puts himself upon the country," etc.

To this plea plaintiff demurred, the court sustained the demurrer, and the defendant excepted. This ruling is the only error insisted upon in this record, and the question to be settled is whether under our statute the foregoing is a good plea of usury.

The "plea of usury must set forth the sum upon which it was paid, or to be paid, the time when the contract was made, when payable, and the amount of usury agreed upon, taken or reserved." Irwin's Revised Code, §3410.

This section of the Code has been construed by this court in the case of *Pattison vs. The Albany Building* and Loan Association, 63 Ga., 377. That construction is that, "a plea of usury must conform to the statute, and

be filed as prescribed. This is one of the defences which has been made the subject of special and particular legislation."

Again in the case of McElroy vs. The City Council of Albany, 65 Ga., 387, it was construed in the following words: "A plea should be complete and perfect in itself, and if it be a plea of usury, then it should set out the usury, its amount, its dates and time." See also Tillman vs. Morton, September term, 1880. An examination of the plea here relied upon will show that it is not perfect in itself. To make it so, reference must be had to the note to ascertain the dates when given, and when due, as well as the time for which the interest was to run. Such particularity in pleading is unusual in the requirements of ordinary defences in this state, but it is made special in cases of usury, and must be complied with.

2. On the argument of this case, counsel for plaintiff in error asked the application of the fourth section of the act of October, 1879, which is "an act to regulate and restrict the rate of interest in this state, and for other purposes." See Georgia Laws 1878-9, pages, 184-5. We do not see that this act can aid in any way the plaintiff in error, as it was not submitted to the judge below, and consequently no ruling thereon was made by him.

Judgment affirmed.

# YOUNGBLOOD & HARRIS vs. EUBANK.

In the absence of any contract, a tenant may remove fixtures erected by him during the continuation of his term, or after its expiration, while he remains in possession under his landlord. If, after the expiration of his term, he surrenders the property without removing the fixtures, they become a part of the realty and belong to the landlord; and he cannot afterwards return and remove them.

(a.) A custom was shown in this case to allow saw-mill men to remove their fixtures, but no time for allowing such removal being shown, it will be construed according to the general law.

Landlord and Tenant. Fixtures. Title. Before Judge STEWART. Pike Superior Court. April Term, 1881.

Reported in the decision.

W. S. WHITAKER, for plaintiffs in error.

W. R. TAYLOR, by JNO. I. HALL, for defendant.

SPEER, Justice.

Plaintiffs in error brought in the justice's court of the 55 1st district, G. M., Pike county, their action for damages against the defendant in error, for the sum of seventyfive dollars and sixty-eight cents. They alleged they were engaged in the saw-mill business, and erected on the land of E. A. Maddox their saw-mill, and for their own use and convenience also erected certain temporary shanties, shelters, lots, pens, troughs and shops, and having moved said saw-mill from the premises, they did contract to sell, about the 25th of May, 1875 (as is the custom of saw-mill men), their shanties, etc., for the sum of seventy-five dollars and sixty-eight cents. But said defendant, on the 12th day of October, 1875, forbid the purchaser from removing said property, thereby preventing them from completing said contract: that said defendant claimed said structures, and was and is in possession of the premises, and has since removed a portion of the lumber in said shanties. They allege said acts of defendant were illegal and tortious, and have injured and damaged petitioners the amount aforesaid.

To this action defendant pleaded the general issue, and also a special plea of justification, alleging that plaintiffs had neither the title nor possession of the property at the time of the alleged wrong, and that they had abandoned the premises and land on which said shanties, etc., were erected long before their alleged sale, and the term of their lease had long before expired. Defendant further

alleged that, as the agent of the owner of said premises, Maddox, he had only given written notice to plaintiffs not to remove said shanties, etc.

Upon the evidence submitted, the judge below, to whom by consent both law and facts were submitted for trial, awarded a judgment in favor of defendant, with costs, to which ruling and judgment the plaintiffs excepted, and assign the same as error.

The evidence in the record shows that the plaintiffs had, by contract, entered upon the premises of Maddox to cut and saw the growing timber on said lands, giving the owner a certain consideration therefor: that for their own use and convenience they had erected certain temporary shanties, shelters, pens and stock lots on the place, and that after remaining on the premises some time, the plaintiffs removed their mill and appurtenances, including their stock, laborers, etc., to another place; that it was the custom of mill-men, so engaged in cutting trees and sawing lumber on shares on the lands of another, to remove or dispose of the structures, etc., erected by them for their own convenience, and, while under this custom they had contracted to sell for removal these shanties, the defendant had forbidden them so to do, and hence they had been damaged the value of said shanties.

Whatever may have been shown to be the custom as to the right of these mill-men to remove from the premises these temporary structures which they had erected during their tenancy for their own convenience and use, there is no evidence in the record as to the time when, under this custom, this right of removal ceased, and, admitting that under this custom, as proved, these plaintiffs might have removed, or caused to be removed, these temporary fixtures, did they have the right to do so four months after their abandonment of the premises and the term of their lease had expired, as the evidence shows they attempted to do in this case?

The custom set up by the evidence is in accord with

the common law rule as to the rights of tenants to remove fixtures made or erected by them. "Fixtures annexed to the freehold are *prima facie* the property of the owner of the soil." In aid of the tenant, however, and in favor of trade, an exception is engrafted upon that rule enabling him to sever the fixtures made by him and so regain his property in them. If he does not avail himself of this right, the fixtures belong to the person to whom the freehold belongs.

As a rule, the tenant must avail himself of his privilege to remove fixtures he erects while in possession of the demised premises, and the true rule probably is that the tenant's right of removal continues while he remains in possession of the demised premises, or in continuation of the same under the lessor. When the lessor re-enters lawfully, he enters upon the full and indisputable possession of that which (subject to the privilege of the tenant) has been his property during the whole term. The tenant is not required, in all cases, to remove the fixtures before his term has fully expired. He may remove them, notwithstanding the expiration of the term, if he remains in possession of the premises under the lessor, but the possession must be held under a right still to be considered the tenant of the lessor.

"In the earlier English authorities the right of the removal was limited to the actual term of the demise, but the more recent authorities settle the doctrine that the right of the tenant to remove fixtures exists during the period during which he might be considered as tenant." Tyler on Fixtures, 426-7; 3 Mees. & Welby, 184; 2 *Ib.*, 450.

The rule in the English authorities thus seems to be, "That in the absence of a contract to protect the tenant in the privilege of removing his fixtures after the term and possession are surrendered, they are regarded in law as abandoned to the use of the landlord."

Generally our American courts have recognized the En-

glish cases as authority upon the question of time in which a tenant's fixtures must be taken away, in order that a tenant may retain his property in them, and in accordance with what was understood to be the doctrine of the English authorities the courts of this country have expressly declared, that if the tenant's fixtures are not removed during the term and the tenant quits the demised premises, and the landlord takes possession, the fixtures become a part of the freehold, and the party who was the tenant cannot legally take them away afterward. Tyler on Fixtures, 434; 7 Barbour, 263-6.

It is generally recognized that the tenant must remove his fixtures before he quits possession on the termination of his lease. And when a tenant quits possession without removing a fixture, he is understood as making dedication of it to the landlord, and this is the doctrine here as well as in England. 5 Cowen R., 323, 327, 328; 20 Johns., 29; 1 Salk., 368; 45 N. Y. R., 792.

Here the plaintiffs as tenants under a contract of lease or tenancy from the owner, Maddox, terminated the same by removal from the premises, and Maddox, the landlord, through his agent, the defendant, re-entered, and so it continued for four months. We are clearly of the opinion that the right to remove these fixtures by the plaintiffs, or dispose of the same ceased, and that by operation of law they were abandoned and became property attached to the freehold and to the owner thereof. Without, therefore, ruling the grounds upon which the court awarded the judgment complained of, we think the judgment was right under the law, and the same is therefore affirmed.

Judgment affirmed.

The Wheeler & Wilson Manufacturing Company vs. Christopher.

# THE WHEELER & WILSON MANUFACTURING COM-PANY vs. CHRISTOPHER.

Where a homestead has been set apart in certain property, but the proceeding is void as to a certain creditor for want of notice to him, the head of the family may re-apply, give him notice and have the property set apart as against him. The first proceedings not working an estoppel against the creditor without notice, does not estop the family from having a homestead set apart as against him.

Homestead. Before Judge POTTLE. Oglethorpe Superior Court. October Term, 1881.

Reported in the decision.

POPE BARROW; GEO. D. THOMAS; H. VAN EPPS, for plaintiff in error.

W. G. JOHNSON, for defendant.

JACKSON, Chief Justice.

The single question made in this record is, whether an effort having been made in 1876 to have a homestead set apart, but being void as the levying creditor for want of notice to him, another homestead in the same property could be set apart in 1881.

The court below held that it could be done, and the plaintiffs in error excepted.

There never was any homestead set apart as to this creditor. A void thing is nothing. Therefore a homestead might be set apart as to this creditor in a case against it, for the reason that the former one, though good as to those notified, was void as to it. And such is the spirit of the rulings in 50th Ga., 216, and Ib., 584. Nor is there any thing inconsistent therewith ruled by this court since. This is not an application for a supplemental homestead out of other property, and hence 54 Ga., 515; 56 Ib., 520; 61 Ib., 501; and 63 Ib., 167, do not apply.

The Wheeler & Wilson Manufacturing Company vs. Christopher.

Homestead proceedings are amendable. 61 Ga., 385. Why may they not be perfected at any time before the creditor asserts his lien?

But we rest this case on the policy of the law, more fully recognized under the constitution of 1877 than ever before, that nothing short of waiver while title is in the head of the family is to defeat the right of the family, and that homestead may be piled now on homestead until the whole pile reached the value fixed in that constitution; and on the fact that the first homestead was voidnothing, as against this creditor.

If the head of the family could exempt other property from the grasp of all his creditors by another homestead, why not exempt this property from this creditor after notice? How is this creditor hurt? The other judgment did not bind this firm or company. The case is not res adjudicata as to these, because they had no notice. 47 Ga., 504: 60 Ib., 462. Ought it then to be res adjudicata as to the homestead family? Clearly not. Yet such is the effect of this point. The other party is concluded by a judgment which did not and could not affect this plaintiff in error, is the position taken. We think it untenable.

When the new application was made, and this creditor was notified, this creditor had every right that it could have had if notified at the first application; and the agent only being then notified the homestead was held void as to plaintiffs in error at their own instance, and now the thing thus declared bad and void at their instance, is set up as so valid that it estops the defendant in error.

In view of the spirit of the constitution and the reasons above given, we think that a homestead, void as to a creditor for want of notice to him, may be made as to him a new and valid homestead by giving him all the rights he would have had, and the void homestead cannot estop the family from getting a valid one.

Judgment affirmed.

Napier, executor, vs. The Central Georgia Bank.

# NAPIER, executor, vs. THE CENTRAL GEORGIA BANK.

- I. Where shares of stock were deposited with a bank as collateral security for the payment of notes, with power in the creditor to sell such stock and apply the proceeds to the payment of the notes if they were not paid promptly at maturity, without further notice to the debtor, a mere failure on the part of the bank to sell the stock at the maturity of the notes constituted no defence to a suit thereon, and gave the defendant no right to damages.
- 2. No statutory duty to sell was set out in the plea, and none exists. A debtor cannot, by notice to his creditor who holds stock as collateral security, force a sale thereof at his pleasure, and in default of immediate sale recover damages against the creditor.
- 3. A plea that the bank had notice from the debtor, both before and after the debt became due, to sell the stock, and that it failed and refused to regard such notice because one or more of its officers. and some of its stockholders were largely interested in the stock of which that pawned was a part, and were engaged in an effort to depreciate the same, and thus to buy the controlling interest therein for less than its value, and in fact did so depreciate it, and that defendant was injured by the refusal to sell in the sum of \$1,250.00, presented a substantial defence, and should not have been stricken on general demurrer. Want of particularity in setting forth the names of the stockholders and officers so proceeding, or the mode of operation, furnished ground for special demurrer.
- 4. A plea which merely alleged that twenty-five shares of the stock were transferred absolutely to the bank, the president refusing to make the loan without such transfer, furnished no defence to a suit on the notes to secure which the transfer was made, and was demurrable.
- 5. That the president of the bank and another stockholder therein engaged in depreciating the stock of which that held by the bank as collateral security formed a part, with a view to purchasing a controlling interest therein, and in fact succeeded in effecting such depreciation, whereby the debtor was injured, did not, without more, make such conduct the act of the bank, so as to furnish a basis for a recovery of damages against it. A plea of recoupment to a suit by the bank on the notes of the debtor setting up the above facts was demurrable.
- (a.) A plea that the bank, through its president, corresponded with the defendant about the sale of the stock, and led him to believe that it was trying to sell the same, which was untrue, and the stock

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depreciated, causing him damage, was demurrable. A plea setting up fraud should state facts, not conclusions or impressions of the defendant's mind.

Pawns. Contracts. Banks. Corporations. Damages. Debtor and Creditor. Fraud. Pleadings. Before Jos. A. Hunt, Esq., Judge pro hac vice. Monroe Superior Court. August Term, 1881.

Reported in the decision.

CABANISS & TURNER; JNO. I. HALL, by HARRISON & PEEPLES, for plaintiff in error.

T. B. GRESHAM; E. F. BEST, for defendant.

CRAWFORD, Justice.

This suit was brought by the Central Georgia Bank against B. H. Napier, executor, upon two promissory notes given for money advanced to him on twenty-five shares of factory stock, which were delivered to the said bank at the time of making the notes, and in which said notes it was stipulated that if they were not paid promptly at maturity the bank might proceed to sell the stock, and apply the proceeds to the payment of the notes without further notice to the maker.

The notes were not paid, the stock was not sold, and the bank brought suit against Napier thereon.

The defendant filed several pleas and amendments thereto, all of which were stricken on demurrer, except that of the general issue and the plea of usury. The case was then tried, and a motion was afterwards made for a new trial for the error committed in striking the pleas: so that the questions here made are upon that ruling of the court.

I. The first plea averred that the twenty-five shares of stock were transferred as collateral security, with full power to sell at the maturity of the notes if they were not paid;

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that they were not paid, and the stock was not sold until the same went down from seventy-five to sixteen cents in the dollar, by which failure of duty on the part of the bank defendant was damaged \$1,250.00. which he asks to recoup. A mere failure on the part of the bank to sell the stock at the maturity of the notes constituted no defence to their recovery, and gave the defendant no right to damages therefor. This plea was properly stricken. 65 Ga., 305.

- 2. An amendment was filed to this plea, alleging that it was the duty of the bank to sell at the maturity of the note, and that the president was notified to sell, but disregarded his statutory duty therein, and the defendant was thereby damaged \$1,500.00. There being no such statutory duty as set forth in this amendment, and no legal right in the defendant to force a sale at his pleasure, this amendment was also properly stricken. Code, §2140.
- 3. The second plea averred notice to the bank to sell the stock both before and after the maturity of the notes, which notice the bank failed and refused to regard, and so refused because one or more of its officers, and some of its stockholders, were largely interested in said factory stock, and were engaged in the effort to depreciate the same, and in this way to buy the controlling interest therein for less than its value, and in fact did so depreciate its value as that defendant was injured and damaged by the refusal to sell, as directed, in the sum of \$7,250.00.

Upon demurrer this plea was stricken, and we think improperly. For whilst it is not full and specific as to the particular officers and stockholders engaged in depreciating the stock, and the manner in which it was done, yet it does distinctly aver that the bank failed and refused to sell the stock because some of its officers and stockholders were engaged in the effort to depreciate the same. If the bank for this reason co-operated with its officers and stockholders to depreciate the value of the shares which they held of defendant, or refused to sell

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with intent to aid in the depreciation, and defendant was thereby damaged, it was a defence which he might set up, prove, and be allowed. Had the bank, however, filed a special demurrer to this plea upon the grounds stated, and no amendment had been made, so as to give it notice, that it might come prepared to meet the averment, and the court had sustained the special demurrer, this would not have been error.

- 4. The third plea alleged that the twenty-five shares of stock were transferred absolutely to the bank, the president refusing to make the loan without such transfer. This transfer being necessary to enable the bank to make the certificates of stock available, and there being no other averment in connection therewith, we see no error in striking the plea.
- 5. The fourth plea averred that the president of the plaintiff and another stockholder in plaintiff's bank, engaged in depreciating the factory stock, with the view of buying a controlling interest therein, and thereby run the stock down to such a small value that no one would buy it, until at last the factory property was sold and only fifteen cents on the dollar paid on the stock; that after the notes fell due the defendant ordered the plaintiff to sell said stock, "the plaintiff, through its president, corresponded with the defendant about the sale of the stock and led defendant to believe that he was trying to sell the same, which was not true, as he made no effort to do so, and which was unknown to defendant until after the stock had so far depreciated that defendant could not sell it at any price." The stock had no market value elsewhere than at Macon, and in order to sell one had to be at that place and defendant could not remain there to find a a buyer, and for this reason gave the order to sell. which failure to sell as ordered defendant claims damages by way of recoupment in the sum of \$1,250.00.

That the president of the bank and another stockholder were engaged in depreciating the value of the stock, did Tabb et al. vs. Collier.

not make it the act of the bank, so as to charge it with any loss on the value of defendant's stock. But if the bank, through its president, acting under the authority properly vested in him as such president, was engaged in depreciating the value of the stock, and at the same time refusing to obey the instructions, with the intent to buy a controlling interest therein, this being the act of the bank, it would render the bank liable to account for the damages sustained by the defendant by reason thereof.

This is not averred, nor is the allegation of fraud in the plea that the president of the bank corresponded with defendant, and led him to believe that he was trying to sell the stock when he was not sufficient. To say that the correspondence led him to believe that he was trying to sell it, is but to give the conclusion of the defendant's mind as to the correspondence. Facts constituting the alleged fraud should be full and explicit, and in what it consisted.

There was no error in striking this plea. Judgment reversed.

## TABB et al. vs. COLLIER.

- 1. When a year's support has been set apart by the ordinary from the estate of a decedent, it vests in the widow and children; its object is their support; and if it be in land, the sale thereof and application of the proceeds is a necessary implication, although there is no express provision of law for that purpose. Therefore, where the widow, with the approval of the ordinary, sells land so set apart, and appropriates the proceeds thereof to the support of the heirs at law, they cannot recover it because no express power is given to the ordinary to order the sale, or because his approval of such sale was irregular.
- Every presumption is in favor of the judgment of the ordinary setting apart a year's support, and it cannot be collaterally attacked.

Year's Support. Title. Judgments. Before Judge HOOD. Early Superior Court. October Term, 1881.

Tabb et al. vs. Collier.

Reported in the decision.

BUSH & LYON, by JACKSON & KING, for plaintiff in error.

H. C. SHEFFIELD, by J. H. LUMPKIN, for defendant.

CRAWFORD, Justice.

This was an action of ejectment brought by the children of George M. Tabb against S. J. Collier, to recover their interest in a lot of land of which their father died possessed.

The record shows that some years after the death of the father, there being no administrator or executor upon his estate, the land was set apart as a year's support for the widow and these children; that after being so set apart it was sold to one Sanders, under whom Collier claims; that Sanders and the widow went to the ordinary, she set forth before him the manner in which she intended to appropriate this money for the benefit of herself and her children, which was approved by him; that the children, seven in number, were feeble, unable to do much work, and the family were in rather destitute circumstances, having no other means of support; that the deed was then executed and endorsed on the back as follows: "Court of ordinary, November 18th, 1869. I approve the within deed, passed an order for the sale of the same." It was also shown that Sanders refused to buy without the approval was endorsed on the deed; that he paid the money to the ordinary, and he paid it to the widow.

1. The vital and controlling issue made upon the trial of this case was that the title to this land vested in the widow and children of the deceased, and having so vested it could only be divested by a sale regularly authorized by the ordinary, or by a chancellor in the mode pointed out by law.

There is no question but that the provision so made, is

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to be for the benefit of the entire family, and is to be, as is declared by law, for a year's support to them, but is not to be administered as a part of the estate. This, then, being so, does it not follow by necessary implication that if this property so set apart is not adapted to the use of the family, that it may, without the aid of courts or chancellors, be converted and made available for the purposes intended? We do not understand that, to be enjoyed, further notices, guardians, and orders are to be obtained to change land, already given for support, into bread before it is to be allowed. To do so would consume not less than two months, and in most cases longer, during which time a family having, as is shown in this case, nothing else to live upon, would come to want.

We hold, therefore, that where a year's support has been set apart by the ordinary, the same vests in the widow and children; and if the same be in land, and the widow by the approval of the ordinary sells it and appropriates the proceeds thereof to the support of the heirs at law, they cannot recover the same because there is no express power given the ordinary to order the sale, or because the approval of the ordinary to such sale was irregular. 50 Ga., 568.

2. But it is insisted that this family had a year's support before this was set apart, the husband and father having been dead some years before the application was made, and cases are cited to sustain that view. The principle here invoked is to be applied before, not after, the final judgment of the ordinary has been pronounced. Every presumption is in favor of their judgments, nor are they to be collaterally attacked except where the record shows a want of jurisdictional facts.

Under the facts as disclosed by the record in this case, the verdict was right, and the judge committed no error in overruling the motion for a new trial.

Judgment affirmed.

#### MITCHELL US. THE GEORGIA RAILROAD COMPANY.

- I. Where a suit was brought against a railroad on a written contract for the shipment of live-stock, the declaration could not be amended by alleging that the agents of the railroad company procured the contract by fraud and deceit as to the capacity and construction of the car to be used in the transportation of the stock—such representations not being in the written contract sued on—and that by reason of such deception the animals were badly crowded in loading, and were seriously damaged. The first suit was on a contract; the amendment was based on a tort.
- (a.) Especially was this the case where the contract was to be executed in the county in which the suit was brought, and the fraudulent statements and loading occurred in another county.
- 2. A railroad company transporting live stock may contract with the shipper for a consideration that the company shall be released from all liability for damages accruing to the stock disconnected and apart from the conduct or running of its trains, such as damages from overloading, suffocation, heat, and the like.

Actions. Amendments. Damages. Contracts. Railroads. Negligence. Before Judge LAWSON. Greene Superior Court. September Adjourned Term, 1881.

Reported in the decision.

JNO. C. HART; H. T. & H. G. LEWIS, for plaintiff in error.

JOS. B. CUMMING, for defendant.

SPEER, Justice.

The plaintiff in error brought his action against the Georgia Railroad and Banking Company for damages. He alleged that plaintiff, in consideration of the sum of thirty dollars, undertook and promised to deliver a certain car-load of hogs, 64 in number, at Union Point, on the Georgia railroad, a station on said road in Greene county. "But the defendant, unmindful of its obligations, had failed to perform their contract; but so carelessly and negligently

loaded said hogs, they being sixty-four in number and very large, by packing them on the single floor of one car, whereby they were so crowded that in consequence thereof sixteen of said hogs died from suffocation, to the damage of petitioner."

A second count in the declaration alleged that the said defendant undertaking, as aforesaid, to transport said hogs to Union Point, wrongfully, carelessly and negligently crowded 64 of said hogs on the single floor of one car, and failing to exercise proper diligence on their part to provide ample room for their transportation, sixteen of said hogs, of the value of \$225.00, perished by reason of the negligent and careless conduct of the defendant, to the damage of plaintiff, etc.

To this declaration an amendment was made appending the written contract entered into between plaintiff and defendant, and in which, among other conditions, was the following, in which, for a consideration therein expressed, it was contracted: "The said owner and shipper of said hogs do hereby assume and release the said railroad from all injury, loss, and damage or depreciation which the animals, or either of them, may suffer in consequence of their being weak, or escaping, or injuring themselves or each other, or in consequence of overloading, heat, suffocation, fright, viciousness, or being injured by fire, etc., etc., while in the possession of said company, or all other damages incidental to railroad transportation, which shall not have been caused by the fraud or gross negligence of said railroad company."

Plaintiff further amended his declaration by alleging, "that the defendant, through its agents, representing they would furnish plaintiff with a suitable car, that is to say one with a double deck, and furnished at the same price, he signed the contract, and plaintiff now complains that the failure to provide said double deck car as promised is a fraud on their part, and their failure to provide suitable means for the transportation of said hogs is gross negli-

gence on their part, and that plaintiff would not have signed said contract but that the foregoing representation was made by the agents of defendant." That the defendant agreed to furnish him, before he signed said contract, with a car suitable for the transportation of stock to the amount of weight of 22,000 pounds, that the weight of said hogs was less than 20,000 pounds, and that plaintiff, relying upon said representations, had said hogs delivered to said defendant at its depot in Atlanta, Georgia, to transport as aforesaid, and said defendant, without the knowledge or consent of plaintiff, did not furnish a suitable car as promised, but on the contrary furnished a single decked car and crowded all of said hogs on one floor, thus deceiving petitioner and committing a fraud. That defendant, through its agents, undertook to load said car without assistance of plaintiff, all of which said acts in overloading said car, not providing a proper car as promised, constituted fraud and gross negligence, by which plaintiff was damaged as aforesaid-said defendant knowing that the car it furnished was not suitable for said transportation, and that crowding all the hogs on said car would endanger their lives. To this last amendment, when offered, defendant below demurred, as containing and setting forth a new and distinct cause of action, which demurrer the court sustained and said amendment was disallowed.

Defendant below then demurred to the original declaration, as amended by the written contract of transportation appended, as not setting forth any cause of action against defendant upon which plaintiff could recover, which demurrer the court sustained and dismissed said action. To both of which rulings of the court plaintiff excepted and assigns the same as error.

1. Was the court right in sustaining the demurrer to the last amendment to plaintiff's declaration on the ground stated, that it was adding a new and distinct cause of action?

The declaration as originally filed, with the written contract between the parties appended, was based upon the special contract in writing exhibited to the writ, and a breach of which was alleged on the part of the defendant, and by reason of which damage had resulted to plaintiff, and for which defendant was sought to be made liable. It is evidently an action founded upon the contract entered into between the parties, in which, for certain considerations therein expressed and under certain conditions therein set forth, defendant had agreed to transport certain hogs of plaintiff and deliver them at one of the depots on said road in Greene county for plaintiff, and which the defendant had failed to do.

An action is merely the judicial means of enforcing a right. Code, §3251.

A civil action is one founded on private rights arising either from contract or tort. Code, §3253.

All claims arising ex contractu between the same parties may be joined in the same action, and all claims arising ex delictu may, in like manner, be joined. Code, §3261.

It will be thus seen that a civil action may arise from a contract or a tort. The former may be maintained either on the breach of a written contract, a parol contract or an implied contract, in the absence of either a written or parol contract.

And so we regard the cause of action as it is set forth in the two first counts in the plaintiff's writ. It is an action for damages arising from the breach of the written contract appended to plaintiff's writ, and is therefore in law an action ex contractu; all claims arising under this contract might have been joined either originally or by amendment, if they arose out of the breach of this contract. But could a cause of action not embraced in this contract, nor arising from it, or by reason of the breach thereof, be joined by way of amendment? We think not.

No amendment adding a new and distinct cause of ac-

tion, or new and distinct parties, shall be allowed, unless expressly provided for by law. Code, §3480.

What is the cause of action proposed by the last amendment? It is not alleged to arise from the contract, nor upon any other contract, either written or by parol, but by reason of fraudulent representations made and deceit practiced to induce the signing of the contract first declared on; it is alleged that it existed and arose outside of the written contract. It is not alleged that in the written contract defendant agreed and promised to furnish a two decked car in which to transport these hogs; but that he represented that this would be done, and this before the contract was signed, and that this representation was the inducement for plaintiff to sign the contract; that by this representation he had practiced a fraud upon plaintiff by which fraud and deceit plaintiff was damaged, irrespective of and outside of the written contract.

The pleader by this amendment was seeking, therefore, to recover on the fraud practiced by defendant on plaintiff and damage resulting therefrom. Fraud by one, accompanied with damage to the party defrauded, in all cases gives a right of action. It is a tort, which is a legal, wrong committed upon the person or property, independent of contract. Code, §2951. And this fraud, thus complained of, is the foundation of the last amendment to plaintiff's writ. It is not only a new and distinct cause of action proposed by way of amendment, but as declared on it is an action founded on a tort and which cannot be joined in an action founded on a contract.

While these rules are general, yet in the case of railroads, under the law there is another reason for maintaining this rule, as it involves the question of jurisdiction. Railroad companies are liable to be sued not only in any county where the cause of action originated, but also on all contracts made or to be performed in the county where the suit is brought. The suit upon the written contract, or upon the cause of action arising therefrom, as the con-

tract was to be performed in Greene county, was properly brought in that county. But what jurisdiction did that court have to maintain a suit upon a tort alleged to have been committed in Fulton county? We can see none, and regarding this proposed amendment to be action for a tort, and a new and distinct cause of action, we think the demurrer was properly sustained in disallowing the amendment.

2. The original declaration, however, was one ex contractu, and of it the court had jurisdiction. The complaint in this is, "that defendant undertook and promised, for a consideration, to deliver a certain car-load of hogs, the property of plaintiff, at Union Point, a depot on said road; but the defendant, unmindful of its obligations, had failed to perform their contract in this, that they so carelessly and negligently loaded said sixty-four hogs, whereby they were so crowded that sixteen of them died from suffocation." These averments set forth a cause of action, if there were nothing more; but plaintiff appends to said declaration the written contract of transportation signed by the parties, and which is a part of said declaration, and in said contract, for a consideration expressed. "the plaintiff assumes for himself and releases said railroad company from all injury, loss or damage or depreciation which the animals, or either of them, may suffer in consequence of their being weak, or escaping, or injuring themselves or each other, or in consequence of overloading, heat, suffocation," etc. The cause of action set out in the writ is therefore barred and defeated by the release of the defendant to the plaintiff in the contract for the damage done to said stock for the causes complained of in said writ.

But it is insisted with great earnestness by the plaintiff in error, through his counsel, that this stipulation in the contract is void in law, and will not be upheld as being also against public policy. This question, under a contract identical with this, was passed upon by this court in Smith vs. Bragg.

the case of the Georgia Railroad and Banking Company vs. Spears, decided at the February term, 1881, of this court, 66 Ga., 485. In that case the opinion of the court was: "We think, so far from this contract being unreasonable and against public policy, it is, on the contrary, a proper and reasonable bargain, which was but just to the railroad in view of the nature, character, and description of the freight itselk" This decision, upholding the legality of this contract, was afterwards recognized and re-affirmed in the case of the Georgia Railroad vs. Beatie, at the same term, and in which this court held: "A railroad company transporting live-stock may contract with the shippers, for a consideration, that the company shall be released from all liability for damages accruing to the stock disconnected and apart from the conduct or running of the trains, as from overloading, suffocation, heat and the like."

We think, therefore, there was no error in the court's sustaining the demurrer and dismissing plaintiff's writ.

Judgment affirmed.

## SMITH vs. BRAGG.

- 1. On the hearing of a writ of habeas corpus brought by a father on account of the detention of his child, he is not entitled as matter of right to its custody, but the matter is in the discretion of the court, on hearing all the facts.
- 2. Such discretion is vested in the court hearing the habeas corpus and not in a reviewing court.
- 3. Even if the judge of the superior court should disagree with the ordinary on the facts involved in the trial of a habeas corpus case, on certiorari, the case should be remanded for a new trial, and not finally adjudicated by the reviewing court.
- (a.) The ordinary did not abuse his discretion in this case, and the superior court erred in reversing his finding.

Parent and Child. Habeas Corpus. Certiorari. Practice in Superior Court. Before Judge POTTLE. Elbert Superior Court. September Term, 1881.

Smith vs. Bragg.

Reported in the decision.

P. W. DAVIS; H. A. ROEBUCK; L. E. BLECKLEY, for plaintiff in error.

WORLEY & CARLTON, for defendant.

JACKSON, Chief Justice.

Bragg, the defendant in error, and his wife parted. She took the child of the marriage, an infant, with her to her brother's, Smith's, the plaintiff in error. The child remained there, with the tacit consent of the father, until the mother's and afterwards the grandmother's death; and when it got to be nine years old the father brought habeas corpus for it, against Smith, the uncle, before the ordinary. The ordinary left the child with the uncle. On certiorari, the superior court reversed the ordinary and awarded the child to the father, and this judgment is the error assigned.

It is in proof that the father spent nothing to support the child; that the aunt, Mrs. Smith, raised it from her own breast, and she and her husband loved it as their own; and no complaint is made in regard to its treatment. The ordinary, as a habeas corpus court, exercised his discretion on the facts, and the question is, did he abuse that discretion, if the law vested it in him in such a case—that is, in a case where the father demanded the custody of his own child.

1. By our law the father is not entitled of right to the custody of his child, but on habeas corpus that custody is within the discretion of "the court, on hearing all the facts." Code, §4024.

That section, taken from the act of 1845, Cobb, p. 335, is as follows: "In all writs of habeas corpus sued out on account of the detention of a wife or child, the court, on hearing all the facts, may exercise its discretion as to whom the custody of such wife or child shall be given,

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and shall have power to give such custody of a child to a third person." Such, too, is the spirit of sections 1733 and 1794.

- 2. What court is to have and exercise this power and discretion? Certainly it is the habeas corpus court first exercising jurisdiction, and not the reviewing court. 34 Ga., 99; 59 1b., 555. True, those cases are where the primary court was the superior and this the reviewing court; but the principle is the same when the ordinary is the primary and the superior the reviewing court. 60 Ga., 456. There the judgment of the superior court was reversed because that court did not allow the justice's court discretion on disputed facts, but sustained a certiorari and overruled the magistrate's judgment. If the magistrate's discretion on facts involving fifty dollars is controlling, much more is that of the ordinary controlling when sitting as a habeas corpus court and expressly invested with discretionary powers by the statute.
- 3. Even if the superior court disagreed with the ordinary on facts, it had no power to pass a final judgment, but should have sent the case back for a new trial on the facts. Code, §4067; 60 Ga., 100; 63 Ib., 331, 743; 65 Ib., 600; 58 Ib., 142; 62 Ib., 345. So that in that view the final judgment of the superior court was wrong.

But the facts, we think, are with the ordinary. Certainly his discretionary powers were not abused. The mother confided the child on her death bed to her brother and sister, and the only thing which disturbed the peace of her death was the apprehension that her husband might get the control of her child. He had abandoned it to her and her relations with no legal steps to recover the boy until he might be useful to labor, and with no contribution to his infantile support. He had married again, and the voice of the dying mother should have controlled rather than that of the father, who had not helped to raise the boy. It matters not that he said his wife left him without cause. Her voice was still in death, and she could not give her version of that controversy.

The ordinary left the boy with her at whose breast he was nourished, a sucking child, and with him who supported the child and raised him to young boyhood, and to both who loved him as their own children.

It is right that he remain with them. Judgment reversed.

## WOLFF vs. CENTRAL RAILROAD COMPANY.

[This case was argued at the last term and the decision reserved.]

- 1. Section 2084 of the Code, providing that the last of a connecting line of railroads over which goods are shipped which receives them as in good order is liable to the consignee, does not apply to baggage of a passenger checked and accompanying him on his passage.
- 2. Where a passenger with a through ticket over a connecting line of railroads checks his baggage at the starting point through to his destination, and upon arriving it is damaged or has been broken open and robbed, he may sue the road which issued the check, or he may sue the road delivering the baggage in bad order.
- (a.) Semble, that under the American authorities each of the roads composing such a continuous line over which a passenger travels on a through ticket, and baggage is sent on a through check, is a principal contractor adopting the contract of the first road, and is therefore liable for spoliation of baggage, irrespective of the point at which it actually occurred.
- (b.) Are such roads also jointly liable as partners or joint contractors?
  Quare.

Railroads. Damages. Negligence. Contracts. Before Judge Simmons. Bibb Superior Court. April Term, 1881.

Reported in the decision.

BACON & RUTHERFORD, for plaintiff in error.

LYON & GRESHAM, for defendant.

SPEER, Justice.

The plaintiff in error, a resident of Macon, Georgia, had been on a visit of several months' duration to New

York city, and carried with her to New York clothing etc., suitable for her use during her stay, and suitable for her circumstances and condition in life. Upon her return home, she purchased a through ticket from New York to Macon, via the Piedmont Air Line route, which ticket was the usual coupon ticket including a coupon for each road, and including a coupon or ticket of the Central Railroad and Banking Company, upon which last coupon or ticket the plaintiff passed over the line of the Central Railroad and Banking Company, with her baggage, from Atlanta to Macon; the latter was received at Macon in apparent good order. Upon opening her trunk she found the locks had been tampered with and the trunk had been robbed of jewelry and personal apparel belonging to her, of the value of over eight hundred dollars. The trunks were checked through from New York to Macon by the same parties selling the tickets. Proof was made of the ownership, value, and loss of the articles from the trunks after they were delivered to the railroad officials in New York, and that the jewelry lost was the personal apparel of plaintiff and suitable to her circumstances and condition in life, and she was bringing the same home as a part of her personal apparel for her use at home.

On closing plaintiff's testimony, the court, on motion of defendant's counsel, awarded a non-suit, and plaintiff excepted.

Counsel for plaintiff in error insists that the rule of liability prescribed by section 2084 of the Code against connecting roads, and under different companies, where goods are to be transported over more than one railroad, includes baggage accompanying a passenger, and which rule "makes the last company which has received the goods as in good order responsible to the consignee for any damage, open or concealed, done to the goods."

We cannot believe it was the intention of the legislature to include the transportation of a passenger's baggage under the term "goods." There are in the same chap-

ter including that section regulations touching the transportation of baggage distinct and different and that do not apply to goods. Section 2071 of that chapter "declares the company responsible for baggage placed in their care." The next section provides for the checking of baggage and imposes penalties for failing to conform to the regulations touching the same. A lien is given to the company for the cost of transportation of baggage, not only for its freight, but also it extends so as to include the fare of the passenger. There are also limitations on liability of the company on the value of baggage for the fare taken, which do not apply to goods. The distinction between goods and baggage is thus so clearly recognized by the context that we cannot construe section 2084 as being intended to include baggage under the term "goods," when accompanying the passenger.

The rule of liability of a common carrier for baggage is well understood, but in the case of connecting roads in the absence of proof as to where the loss occurred, which one is liable is now the question? Defendant in error insists that the company in New York who sold the through ticket and made the contract is responsible to the passenger. And so this court ruled in the case of *Hanley vs. Screven*, 62 Ga., 347. but did not rule that such road alone was liable. But is this the only one liable, unless the act of spoliation is established as having occurred on a particular road? This is a question of vital moment to the public and of no small interest to these connecting roads.

The record shows in this case plaintiff in error purchased a through ticket from New York to Macon by the "Piedmont Air Line route," and which included a coupon ticket on the Central railroad from Atlanta to Macon, and by which the connecting roads contracted to transport her and her baggage from New York to Macon. Where or when the spoliation of her baggage occurred the evidence does not disclose, though robbed on the route presumptively between New York and its delivery at Macon to the plaintiff in error.

In the absence of positive statutory regulation as to the liability of connecting roads in the transportation of baggage with passengers, where loss or damage occurs to the same, we find the rulings of the English and American courts are not in harmony. The English courts hold the carrier who receives the goods and contracts to carry them over the entire route is liable, for they hold the intermediate carriers are but its agents, and there is no privity of contract between the agents and owner of the goods. The courts of this country do not recognize this doctrine, and we do not think it fair to our own citizens to send them to a foreign jurisdiction to seek redress, if it can be avoided consistently with our rules of law. We are led to conclude from an examination of our authorities, the true rule in case of connecting roads for liability for baggage should be, that in its transportation as baggage, when two or more railroads are associated together and form a continuous line for the transportation of passengers and baggage, giving to each the right to sell these through tickets with coupons over the several connecting or associated roads, and thus bargaining for the transportation of passengers over the whole line and receiving the price of said tickets, the same to be divided between them at periodical settlements, the company so selling and contracting for such transportation is the agent of the several companies composing such lines, rather than to regard the other companies as its agents in performing the service allotted to them. 9 Am. Rep., 493; 6 Ib., 434. The sale of such tickets is for the common benefit of all the companies, and the receipts from them are presumptively divided between them in proportion to service rendered by each, making them interested as principals and not as agents. stand substantially in the position of partners in such through business, and may be, perhaps, jointly as well as we hold them to be severally liable as such.

There are numerous decisions that hold them as to this through business jointly liable as partners through the entire route. Angel on Car., 93, and cases cited; Story

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on Bailments, 506, and cases cited; 11 Wend., 571; 19 Ib., 329; 7 Rich., (S. C.) 201; 4 Seld., 37; 11 Wend., 575; 43 Barb., -. To hold these continuous or associated companies severally liable on these through contracts of transportation springs from the necessity of the rule, To remit the owner whose baggage has been lost or damaged on a through ticket to the company where the spoliation or loss occurred, is simply to deny him all redress. For he has no facility or means to ascertain the facts, only at the pleasure of the company, who it is presumed will not be prompt to furnish evidence of their own negligence and liability. To drive the owner to a foreign jurisdiction for redress is not consistent with our public policy. To hold each company liable for negligence or loss incurred while transporting under one continuous and joint contract made with the owner, will interest all alike to be diligent, and if loss should occur, it is the more equitable for the losses to be apportioned among them as they apportion the profits of their joint enterprise, rather than the loss should be borne alone by the owner.

The contract is made to transport with the joint continuous line, they act for each other, and receive its fruits as common agents one for the other. Let the rule applicable to like engagements in other departments of life be applied to them, and each will be liable without reference to the road where the default occurred. This rule is founded in equal justice, and is far more equitable and convenient than the rule that would hold the company alone liable who sold the through tickets, and who may be as free from fault as any intermediate road. In any view, the last of the connecting roads receiving the trunk in apparent good order is presumptively liable, and that determines this case as to awarding the non-suit.

Judgment reversed.

JACKSON, Chief Justice, concurring, stated that the exact point decided and in which the entire court concurred, was as to the grant of the non-suit on the ground of non-liability of the last road.

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Richardson et al vs. Langston & Crane.

#### RICHARDSON et al. vs. Langston & Crane.

An affidavit to foreclose a lien which alleged that the defendant was a merchant selling dry goods and groceries, and that he was indebted to the deponent "for services rendered as clerk, laborer and general service in said store," was not demurrable as not setting out the fact that the plaintiff was a laborer sufficiently to furnish a foundation for a f. fa. On a money rule in which such a f. fa. claimed a fund, it should not have been quashed on motion; if the fact that the plaintiff was a laborer was contested, the question should have been raised by a traverse, and submitted to the jury.

CRAWFORD, J., dissenting.

Liens. Laborers. Pleadings. Before Judge WILLIS. Newton Superior Court. September Term, 1881.

Reported in the decision.

SIMMS & SIMMS; J. J. FLOYD, for plaintiffs in error.

CLARK & PACE; MCCAY & ABBOTT, for defendants.

CRAWFORD, Justice.

Langston & Crane, with a mortgage f. fa., and A.D. Richardson, Wm. R. Brown, J. E. and W. S. Latimer, with fi. fas. founded upon laborers' liens, were contestants for certain money in the hands of the sheriff raised from a sale of the property of their common debtor. The court, on motion of counsel for Langston & Crane, quashed the fi. fas. of the other parties, upon the ground that the affidavits upon which they were founded were fatally defective. They set forth that Elliott, the defendant, was a merchant selling dry goods and groceries, and that he was indebted, etc., to Richardson "for services rendered as clerk, laborer, and general service" in said store; to Brown "for services rendered as clerk, laborer, etc., and general service" in said store; to J. E. and W. S. Lati, mer "as clerk or laborer and general service in said store."

#### Richardson et al. vs. Langston & Crane

It will be seen that these affidavits allege that the deponents were laborers, and as liens are provided for such persons by law, the opinion of this court is, that the judge below erred in quashing the fi. fas. on demurrer, as it admitted the truth of the allegation; and, that if the other contestants desired to traverse the facts, or denied that they were laborers under the law, that the same should have been inquired of and passed upon by a jury.

My own opinion is that he did not err, as the affidavits are wholly insufficient to show the parties entitled to the lien which they set up, and that the fi. fas. were properly quashed.

By the constitution of 1868 it was provided that "mechanics and laborers shall have liens upon the property of their employers for labor performed, or material furnished, and the legislature shall provide for the summary enforcement of the same."

Under this clause in the constitution, §§1974 and 1975 of the Code were adopted to give laborers general and special liens for their labor, and §1991 to provide for their enforcement.

To entitle one to this summary right to an execution against the property of another, without a hearing, the uniform ruling of this court has been, that he must bring himself strictly within the requirements of the law. §1991 declares that he must show all the facts necessary to constitute a lien under the Code. I do not understand that clerks, or persons doing general service, although they may labor, are therefore laborers in legal contemplation. If they are to be included in the general term laborers, then I see no limit to the exercise of this extraordinary right of having execution on oath, by all agents and employes, such as cashiers, tellers and book-keepers of banks, secretaries, treasurers, book keepers, salesmen and superintendents of manufacturing companies, as well as all the officials in railroads below the president, whether in the offices or on the roads. To enlarge upon class legislation

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by implication should not be the policy of courts, and especially so where *ex parte* summary remedies are allowed.

I think these affidavits in any view are defective, because indefinite and uncertain. They allege that the deponents were clerks and laborers, and did general service for the defendant, for all of which he was indebted the amounts of their respective claims. It must follw, therefore, that it is not all due for labor, but part for clerking—part for general service—and part for labor, whilst they can only have and enforce a lien for the last. Nor do I think that this view is in conflict with the case of Oliver vs. Boehm, Bendheim & Co., in 63 Ga., for in that case, although the affiant said that he was a clerk, bar-tender, and boy of all work, yet he specifically set out at length the actual manual labor which he performed.

In this case, however, if the words "clerks and general service in said store" were considered surplusage, or even had been omitted, it is hardly to be supposed that the words "for services rendered as laborers," without more, would stand the test of a demurrer.

It is not to be understood that my brethren either assent or dissent to all that I have said, but they rest the case, without more, on the error of the judge in sustaining the demurrer and quashing the fi. fas. without allowing the parties to show that they were laborers, and as such, entitled to a part or all that they claimed, and more especially so as the demurrer admitted that they were laborers.

Judgment reversed.

Byrd vs. The State.

## BYRD vs. THE STATE OF GEORGIA.

- I. The acts and conduct of one accomplice during the pendency of the wrongful act, not only in its perpetration, but also in its subsequent concealment, are admissible against the other. So also are his sayings pending the common criminal enterprise.
- 2. A confession of larceny of meat by an employ6, induced by a statement from his employer that "if he would bring up the meat, there was a probability the whole matter could be settled," comes within the prohibition contained in section 3793 of the Code, and should not have been admitted.
- The offence was not made out without the admission of the confessions, and a new trial is ordered.

Criminal Law. Confessions. Accomplice. Evidence. Before Judge HARRIS. Campbell Superior Court. August Term, 1881.

Reported in the decision.

- T. W. & GEORGE LATHAM; ROAN & ROSSER, for plaintiff in error.
  - H. M. REID, solicitor general, for the state.

SFEER, Justice.

Byrd was charged with the offence of larceny from the house. On a trial he was found guilty by the jury. A motion for new trial was made, which was overruled, and he excepted. The grounds of the motion were:

- (1.) The admission in evidence of certain acts and conduct of one Tom Betts, who was charged as an accomplice and principal in said offence.
- (2.) The admission in evidence of certain confessions of Byrd, the accused, given in under the circumstances detailed in the record.
- (3.) Exceptions to certain portions of the charge of the court as given to the jury on the trial.

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I. Betts and the accused were charged as accomplices in this offence. Betts, as the principal, and the accused as aiding and abetting. The evidence in the record shows them together at the place and time when the alleged larceny was said to have been committed; that they were in the store and near the place where the meat alleged to have been stolen was located; that Betts was seen to leave the store with a sack and something in it, and placed it in a wagon in which both he and the accused, with others, returned home after night; that this occurred on Saturday evening, and on Monday morning when officers with a search warrant were approaching the houses of defendants, that Betts was seen to leave his house and go around with something under his arm wrapped in a cloth.

Prima facie under this proof, and during the pendency of the wrongful act, not only in its perpetration but in the effort at concealment, the act and conduct of one accomplice is admissible against the other, as are also his sayings pending the common criminal enterprise. They go to establish his guilt; and if the other is shown to have aided and abetted the offence, they are evidence of his guilt, for the act of one is the act of both when the common criminal intent is established. Hopkins' Code, 536.

2-3. Were the admissions or confessions of the accused admissible under the circumstances as shown in the record? William Johnson, by whom these confessions were proved, was the proprietor of the place on which the accused and Betts lived, and they were in his employment. Johnson testified that on the morning the officers were there to look for the stolen meat, "he heard a noise near his back door, that he went out and found William Jackson (the prosecutor) and a bailiff talking to the defendants. They were talking about the meat which Jackson claimed was stolen from him the Saturday evening before, and accused defendants of it, but they denied it; that Jackson and the bailiff then left, but the bailiff returned with a search warrant and searched the premises of defendant and found

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nothing; that he (witness) then had a talk with Betts, the accused, and told him "it would be best for them to bring up the meat, that if they would do so there might be and there was a probability that the whole matter could be settled;" but they denied all knowledge of the affair. That he had another talk with defendant, Byrd, and told him "it would be best for him to bring up the meat, that if he would do so (as Tom Betts had already brought up his meat) it was probable the whole matter could be compromised:" that the accused said nothing, but after he left, the accused sent word he would send up the meat; that witness sent him word he would not receive it unless he brought it himself; that the accused then brought one ham weighing twelve or thirteen pounds. Witness did not know it was Jackson's meat; saw nothing to distinguish it from other hams. When the ham was returned, witness saw Jackson and settled the whole matter by paying him the money for the ham he claimed to have lost. When the accused returned the ham, witness said to accused, "this is the meat you got at Jackson's"; he answered "it was the meat."

The rule upon the subject of the admissibility of confessions is prescribed in our Code: "Confessions induced by another by the slightest hope of benefit or the remotest fear of injury, are inadmissible as evidence." Code, \$3793.

Here the accused had denied positively any knowledge of the affair, or having the meat, but when assured by the employer on two several occasions, "if he would bring up the meat there was a probability the whole matter could be compromised and settled," he is induced to act and speak. We think the confession (so far as he spoke at least) was clearly induced by the promise of this benefit, and there was error to admit it.

In carefully looking through the record, we are satisfied the offence was not made out without the admission of these confessions. The prosecutor could not swear posiThe County of Lee vs. Walden, administratrix.

tively he had lost any meat; it was missing, as he thought, from the quantity in the tierce between the period when he left it on Saturday afternoon and when he returned on Monday morning but he also swore there was a considerable trade going on after he left the store, and he could not swear the clerk he had left in charge had not sold it in his absence. There is no corpus delicti proved except by the confessions admitted, and nothing besides to identify the meat lost to be the same as the meat recovered. We are to administer the law to the humblest, and accord them their full legal rights; and we are by no means inclined to relax the rule against a class when the confessions are made to an employer by one who is under his control and who naturally would rely with implicit faith on any inducement thus held out to him.

As to the charge of the court complained of in the fourth ground of the motion, there is no error; but as we cannot know what weight this inadmissible confession had upon the jury, and as we think the offence charged against the accused, was not (in the absence of this confession) satisfactorily proved, we feel it our duty to reverse the judgment and order a new trial.

Judgment reversed.

# THE COUNTY OF LEE vs. WALDEN, administratrix.

- I. Affidavits of illegality are amendable instanter, upon motion and leave of the court granted, by the insertion of new and independent grounds, whenever the defendant will swear that he did not know of such grounds when the original affidavit was filed.
- 2. That a case involves other matters than those of account does not make it necessary to send it in its entirety to an auditor. He examines and reports upon such matters only as he is directed to consider. Upon the return of such a report, exceptions of fact having been filed, the verdict of a jury thereon settled only the facts involved in the issues made, leaving other branches of the case undisposed of as before.
- 3. Execution may be issued against one who has funds of a county

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in his hands, or against a defaulting tax collector and the sureties on his bond; but an execution founded on his bond cannot be enforced on the ground that he has public money in his hands, where it appears that he did not in fact give a bond. To hold him liable for public funds held by him, a proper execution must be issued.

Executions. Amendment. Practice in Superior Court. Auditors. Bonds. County Matters. Before Judge CRISP. Lee Superior Court. November Term, 1881.

Reported in the decision.

F. H. WEST; R. F. LYON, for plaintiff in error.

K. J. WARREN; W. A. HAWKINS, for defendant.

CRAWFORD, Justice.

On the 8th day of December, 1871, the ordinary of Lee county issued an execution against Gadsey Walden, administratrix of W. H. Walden, of said county, and his securities for the sum of \$1,436.77, and \$362.72 penalty and interest for failing to pay over the principal sum aforesaid, with twenty per cent. interest until paid.

To this fi. fa. the administratrix filed an affidavit of illegality upon several grounds; all were dismissed on demurrer except that denying the indebtedness of the deceased tax collector, which was referred to an auditor. His report was made at the November term, 1880, of the superior court, and to which exceptions of law and fact were filed by the defendant.

At the same term of the court the defendant amended her affidavit of illegality, upon the ground that her intestate did not sign, seal, or deliver any bond as tax collector, and that such fact was wholly unknown to her when her first affidavit was made. Objection was made to the reception of this amended affidavit by plaintiff's counsel, upon the grounds, first, that it made a new case; second, The County of Lee vs. Walden, administratrix.

that it came too late; third, that the defendant could have known it; and fourth, that defendant's intestate held county funds. These objections being overruled, plaintiff's counsel excepted *pendente lite*, and that ruling makes the first question for our consideration.

1. Affidavits of illegality are amendable upon motion and leave of the court *instanter* by the insertion of new and independent grounds, whenever the defendant will swear that he did not know of such grounds when the original affidavit was filed. Code, §3501.

The case, then at the November term, 1880, stood before the court on the auditor's report as to the amount due, the defendant's exceptions thereto, and the new ground set out in the amended affidavit of illegality. At the November term, 1881, the exceptions of fact were tried by a jury, and a verdict returned finding in favor of the defendant, and allowing her \$685.00 as a credit upon the fi. fa.

The court then proceeded to the consideration of the amended affidavit of illegality, which the parties agreed to submit to the judge for trial on the law and facts without a jury.

Plaintiff demurred to the affidavit, first, because it went behind the judgment; second, because the liability of the defendant had been fixed by the auditor upon the issues tried; third, because the fi. fa. was proceeding only against the property of the intestate who held money collected from taxes in his hands, and was liable whether he gave a bond or not. The demurrer was overruled on each of the grounds, and the plaintiff excepted.

2. Ample provision is made by law for the issuance of executions by the ordinary of a county against all persons who may have in their hands any money belonging to the county. Provision is also made for defendants in such executions to file affidavits of illegality where they issue for too much, or where they deny owing the same under the rules governing other illegalities. Code, §\$524, 525.

The County of Lee pr. Walden, administratrix.

Auditors may be appointed at law, as in equity, in all cases involving account. That causes involve other matters than account does not make it necessary for the court to send them all to be inquired of by the auditor. He examines and reports only upon such as he is directed, and when returned they may be excepted to, and those of fact go to a jury. When a verdict is rendered thereon, it settles only the facts upon the issues made, leaving all other matters undisposed of as before. Code, §3097.

Thus the verdict in this case did no more than dispose of the issues submitted, and the court did not err in taking up those questions which had not been sent down to the jury.

3. Nor do we think that the amended affidavit should have been dismissed on the third ground, for the reason that the effect of the demurrer was to admit that, even if there were no bond, the defendant would be liable, although the execution had been founded upon one, if it were only proceeding against his property.

The judge, after the evidence was submitted, found that the ordinary had no authority to issue the fi. fa. upon such a bond, it having been made to appear that none but the securities had signed it, and the fi. fa. being against the principal and his securities, and it further appearing that the said fi. fa. was issued upon the same. The court thereupon sustained the amended affidavit of illegality, and adjudged that the fi. fa. was proceeding illegally against the property of the defendant's intestate.

A motion was made for a new trial on the issues submitted to the jury, but none on the finding upon the issues of fact tried by the judge. The former was granted upon terms as to one issue, which were accepted, and refused upon the other, two only being submitted to the jury.

We hold that, as the judge found upon the trial before him that the fi. fa. was founded upon a bond not signed by the defendant's intestate, that the same was illegally proceeding and was properly arrested.

Rounsaville et al. vs. Kohlbeim.

We are, however, not to be understood as holding that for any amount of the public money in the hands of the defendant's intestate at the time of his death, that his estate is not liable therefor under a proper fi. fa.; we only say that he cannot be held liable under a bond upon which this fi. fa. was issued, wherein his name does not appear.

It is unnecessary to rule the questions made on the motion for a new trial, and to dismiss this writ of error, as the decision which we here pronounce disposes of the case.

Judgment affirmed.

## ROUNSAVILLE et al. vs. KOHLHEIM.

[This case was argued at the last term, and the decision reserved.]

A private stable in a city is not necessarily a nuisance, though erected near the line separating the lot of the owner from that of a neighbor, whose house is near the dividing line. But he who so builds must, at his peril, guard against such construction, as by the ordinary use of the stable would disturb adjacent owners by the noises produced, or against such use thereof as will cause stench or like annoyance upon the property of his neighbor.

(a.) Mere allegations of speculative or contingent injuries, with nothing to show that they will in fact happen, do not require an injunction.

JACKSON, C. J., concurred on special grounds.

Nuisance. Equity. Damages. Injunction. Before Judge Underwood. Floyd Superior Court. March Term, 1881.

Reported in the decision.

DARNEY & FOUCHE, for plaintiff in error.

YANCEY & DEAN; J. BRANHAM, for defendant.

Rounsaville et al. vs. Kohlheim.

# CRAWFORD, Justice.

This bill was filed to enjoin the defendant from building a private stable on his own lot, in the city of Rome, adjoining that of the complainant's. The grounds for the application of the injunction were that large quantities of litter, manure and filth will be gathered in said stable; that swarms of flies and other insects, and vermin will be generated therein; that noxious vapors and foul stenches will be generated; that there will be an eternal stamping of horses and lowing of cattle in said stable; and if the defendant is permitted to locate and use said stable at the place upon which he proposes to build it, the injury, inconvenience and damage to the property of complainants will be irreparable.

The bill was dismissed at the hearing for the want of equity, and the only question here is, was that error?

It was ruled in 9 Ga., 425, "That a livery stable within sixty-five feet of a hotel, which would result in the loss of health and comfort of the proprietor's family, and the loss of patronage to his hotel in consequence of the unhealthy effluvia arising therefrom, and the collection of swarms of flies, and the interminable stamping of horses therein, would operate as a nuisance, and that the landlord was entitled to an injunction to restrain its erection."

This ruling was made upon the refusal of the chancellor below to grant an injunction restraining the erection
of the building. Upon the coming in of the answer in
the same case, denying the main allegations in the bill,
and setting up the fact of a removal of the plank floor,
and that by the use of lime-water, and keeping the stalls
neat and clean, as well as other precautionary measures,
that there would he no damage to the complainant resulting from the said stable, the chancellor dissolved the injunction. This ruling by the chancellor brought the case
again before this court, as may be seen in 10 Ga., 336, and it

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was there held, "That the ad interim injunction should not have been removed, but should have been continued to the final hearing." Further, that "If upon the hearing the jury should be of opinion that this stable with its inmates and attendants is not a nuisance of itself, but that it may be kept in such manner as to make it unobjectionable, they will no doubt require that it shall be kept in this manner, or provide adequate protection to the complainant."

This same subject of building a livery stable again came before this court on the granting of an injunction to restrain its erection, and is reported in 20 Ga., 537. It was there held that to enjoin nuisances in the course of erection, that the evil sought to be remedied must not be "merely probable, but certain," and Lumpkin, C. J., in the opinion, adds "inevitable." And further, that if "the establishment were properly kept, that instead of being certain that the stable would be a nuisance, the probability is it would not be."

This brings the rule where we think the law puts it, that livery stables may be so located as to become nuisances; and so may any private stable be so located with reference to the dwellings, or places of business of others, and be so improperly kept and conducted as to become an actionable nuisance. But the mere probability that it will become so is insufficient to deprive the owner of a lot of the right to erect a stable for his own use, although it may be on the line of his lot, and quite near the dwelling of an adjacent owner. It is true that he who thus builds, must at his peril guard against such construction as that its ordinary use would disturb adjacent owners by the noises produced, or manage it in such way as to permit offensive stenches to emanate therefrom, and float over his neighbor's premises to his serious annoyance and dis-·comfort.

Although there are variations in the manner of the different courts in stating the law, we think that this is the Rounsaville et al. vs. Kohlheim.

proper legal rule on the subject, as well as that it is the most general one adopted. Wood's Law of Nuisances, §\$526, 7-8-9.

It was ruled by the supreme court of Texas in Burditt et al. vs. Swenson, 17th vol., 489, "It would seem that a livery stable in a town is not necessarily or prima facie a nuisance, but that it depends on whether from the manner in which it is either built, kept or used, it destroys the comfort of persons owning and occupying adjoining premises, or impairs the value of their property."

In 9 Iredell, 244, it was held that, "A stable in a town is not like a slaughter-pen or a hog-sty, necessarily or prima facie a nuisance. But if it be so built, so kept or so used as to destroy the comfort of persons owning and occupying adjoining premises, it does thereby become a nuisance, though in itself it be a convenient and lawful erection."

In 11 Humphreys', 407, the court say that, "A livery stable in a town is not necessarily a nuisance in itself, and therefore a court of equity has no jurisdiction to restrain by injunction, either the completion of a building because intended for that purpose, nor its appropriation to the use intended."

In the case of Earl of Ripon vs. Hobart, 3 Mylne & Keene, cited in 2 Story's Eq., § 924, note 1, Lord Brougham says that, "No instance can be produced of the interposition of courts of equity by injunction in the case of an eventual or contingent nuisance."

If then this be the law in reference to livery stables, the right to build a private one should not be denied, and especially so upon an apprehension that it will become a nuisance. In this case all the allegations except the mere location are speculative and contingent, the bill was therefore without equity, and should have been dismissed. Whilst the building of this stable may not be a kindly or neighborly act, yet with this the courts have nothing to do, they are simply to decide whether in itself it is an unlawful one, and therefore to be suppressed.

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Raiford vs. The State.

To hold that there is equity in this bill, is to hold that the building of a private stable on one's own lot is per se a nuisance, and that an adjacent owner may dictate its location upon some other part of the lot, because he has seen fit to build his own house within nine feet of the line. Otherwise, to send it to the jury, would befor them to pass on that which does not yet and may never exist; that is, the manner in which it is to be used, or the manner in which it is to be kept, will make it a nuisance.

Judgment affirmed.

JACKSON, Chief Justice, concurring, said that if one who had sufficient room and can, without injury to himself, locate a stable elsewhere than in immediate proximity to his neighbor's premises, where it will be offensive to the latter, equity will restrain him from so locating it. I concur in the decision on the ground that it does not appear that the defendant could locate the stable elsewhere as well as where he was proceeding to place it.

## RAIFORD vs. THE STATE OF GEORGIA.

- 1. The testimony of the female engaged in the incest with which the defendant was charged was amply corroborated by other evidence.
- 2. In the crime of incest there may be a certain force or power exerted, resulting from the age, relationship or circumstances of the parties, which overcomes the objections of the female, without amounting to that violence which would constitute rape.

Verdict. Witness. Criminal Law. Before Judge CARSWELL. Jefferson Superior Court. November Adjourned Term, 1881.

Reported in the decision.

- H. D. D. TWIGGS, for plaintiff in error.
- R. L. GAMBLE, solicitor general, for the state.

#### Raiford vs. The State.

# CRAWFORD, Justice.

The plaintiff in error was indicted for incestuous fornication with one Kate C. Griffin, his niece, was found guilty, moved for a new trial, which was refused, and that refusal is complained of as error.

There were several grounds in the motion for a new trial, but a decision upon two of them will rule the case, and they are:

- (1.) That Kate C. Griffin being an accomplice, and the only witness for the state who testified to the criminal act, is uncorroborated by other evidence.
- (2.) That the evidence makes out a case of rape, and not incestuous fornication.
- 1. Was there, then, sufficient testimony in corroboration of that which was sworn to by the unfortunate young woman to authorize the verdict?

It is shown by the evidence that the household consisted of the grandmother, the defendant, and this niece; that her mother had been dead thirteen years, during which time she had lived in the house with the defendant; that about three weeks before the birth of her child, she had been sent off under pretence of attending school, when her condition must have been known to him; that Scott Parsons, a servant, who, to use his own language, had "lived off and on" with the defendant for seven years, had seen him in her room, on the bed with her, and with her clothes up above her waist; that he saw this more than nine months preceding the birth of her child.

There was no attempt made to impeach this witness or controvert his testimony; taken, therefore, in connection with the testimony which she had given to the jury, it would have been strange indeed, if they had not been satisfied of the truth of the charge when so corroborated.

2. The next question to be considered is, whether the evidence makes out a case of rape, instead of incestuous fornication?

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The testimony of the young woman was that the defendant had sought to have criminal connection with her all through the year preceding that in which she had her child; he commenced by feeling her breasts, and then by promises of presents; he told her that being her uncle it made no difference; he attempted to have intercourse with her on several occasions, sometimes he would try, and happening to hear something he would stop and go away from her. She stated that the sexual connection which she had had with him was not voluntarily indulged in by her; she had been taught to obey him, was afraid of him, and gave up to him because she was afraid of him; the intercourse between them was by coercion.

This evidence clearly shows the relations between these parties, and exactly how the defendant accomplished the ruin of this young woman. Doubtless his first approaches towards her did fill her mind with consternation amounting to a sort of vague and undefinable fear. Standing to her in the relations which he did, her confusion was only equalled by her ignorance of what to do. and motherless, brought up in the house where he stood as the head of the family, taught to obey him, and above all being the very man to whom she would naturally turn to protect her against wrong, we can well imagine the truth of her statement, that the sexual intercourse was not voluntarily indulged in, and that the coercion of which she spoke was but the paralysis of all power to suggest a reason against the terrible wrong, or assert herself against his caresses and apparently loving force until he had accomplished her ruin.

This unnatural crime, as was said in the case of *Powers* vs. The State, 44th Ga., 214, is generally the act of a man upon a woman over whom by the natural ties of kindred he has almost complete control, and generally is alone to blame. There is a force used, which, while it cannot be said to be that violence which constitutes rape, is yet of a character that is almost as overpowering.

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We concur in the view which the judge pronouncing the opinion in the above case has so clearly stated, and are of opinion that the evidence in this record does not make out a case of rape, but of incestuous fornication.

We hold further, that the charges and refusal to charge without qualification were not in violation of law, but in harmony with the foregoing ruling, and justified by the evidence submitted.

Judgment affirmed.

## MITCHELL vs. PRINTUP, BROTHER & POLLARD.

- I. If credit be given to an agent individually, payment cannot be afterwards demanded of his principal; and in a suit between the creditor and the principal involving the state of their accounts, testimony as to credits given to the agent individually is irrelevant.
- A payment to an agent who is known to be such by releasing his own debt is not a payment to the principal.

Evidence. Principal and Agent. Debtor and Creditor. Before Judge LAWSON. Green Superior Court. September Adjourned Term, 1880.

Reported in the decision.

W. O. MITCHELL, by brief, for plaintiff in error.

J. L. Brown; JNO. C. REED, by brief, for defendants.

CRAWFORD, Justice.

Printup, Bro. & Pollard sued J. H. Mitchell on an open account, amounting to \$320.00, for guano sold to him. He pleaded in defence payment, and set-off in the sum of \$408.55, for three bales of cotton purchased by E. G. Williams, agent.

The facts of the case, as appear by the record, are that Williams was the agent of the plaintiffs to sell guano, and

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sold that which is the subject of this litigation to the defendant. The cotton which the defendant seeks to set off was sold by him to Williams in 1875, who represented to defendant, Mitchell, that he had money in the hands of plaintiffs with which he would pay the debt. Not having paid it, and having Williams' due bill for the cotton, Mitchell employed an attorney-at law, in 1877, to collect it, which he sought to do by contracting with Williams for the fertilizers sued for, and taking a receipt for the \$320.00 signed by Williams, agent, for the plaintiffs in payment for the guano.

The jury, under the evidence and charge, found for the plaintiff, and the defendant moved for a new trial on the statutory grounds and because:

- (1.) The judge withdrew from the jury all the testimony of Williams and J. H. Mitchell in reference to the cotton transactions, and the contract about the purchase and sale of the cotton between Williams and plaintiffs.
- (2.) Because the judge erred in charging the jury that if they believed from the evidence that Williams was the agent of the plaintiffs in the sale of guano, and defendant or his attorney knew it, then Williams had no right to sell the guano and take in payment a debt he was owing on a due bill, although he had represented at the time of the transactions and before the sale of the guano, that he had authority from his principal to make such a trade, because his principal was owing him; and although said defendant, or his agent, acted upon such representation when he bought the guano, that while representations of agents generally bind their principals, such a representation as this could not.
- I. On the first ground of exception we think that the judge committed no error in ruling out all the testimony of Williams and Mitchell as to the cotton transaction, for it had no legitimate connection with the matter in controversy. The sale of the specific cotton for which the defendant seeks to collect out of the plaintiffs in this suit,

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was made in the fall of 1875, made to Williams individually, and his individual note or due bill taken therefor. He was not the agent of the plaintiffs to buy cotton, but even if he had been, the defendant, by giving credit to him individually and taking his note for the money, cannot afterwards demand payment of the principal. Code, §2198.

2. Nor was there any error committed by the judge in that part of his charge to which exception is taken. Its legal effect and meaning is, that if the jury believe from the evidence that Williams was the agent of plaintiffs to sell guano, and the defendant or his agent knew it when the guano was bought, then they could not buy the principal's guano from the agent and pay for it in the agent's own note, even though he may have said that he was authorized to do so, as the principal was owing him money.

The proof was clear that the effort of the defendant's attorney was to avail himself of this method of enforcing the collection of Williams' insolvent debt out of the plaintiff's fertilizers. But even if the law were as claimed by defendants' counsel touching the liability of the plaintiffs for the acts and sayings of the agent, in this transaction it will be observed that he put the authority not upon the power of his agency but upon the fact that the principal was owing him and, therefore, it would be all right. Had he stated the truth, doubtlesss it would have been all right, but being mistaken, and the defendant thus seeking to pay the debt of the plaintiffs by giving up to Williams his own note, left his debt unpaid and still due against him. For it is well settled by the authorities and our own court that a payment to an agent who is known to be such by releasing his own debt is not a payment to the principal. 30 Ga., 836.

Judgment affirmed.

Hardee vs. McMichael, administratrix.

## HARDEE vs. McMichael, administratrix.

- 1. Where land was sold, a part of the purchase money paid, a bond for title given, and a note of the purchaser held for the balance, the title remaining in the vendor was subject to levy and sale under a f. fa. against him. The purchaser would obtain only such interest as the vendor retained, and be subrogated to his rights.
- The evidence as to the statute of limitations was not such as to require a verdict for the claimant.

Vendor and Purchaser. Liens. Levy and Sale. Title. Before Judge FLEMING. Randolph Superior Court. May Term, 1881.

Reported in the decision.

C. B. WOOTEN; KENNON & HOOD, for plaintiff in error.

GUERRY & PARKS; L. C. HOYL; L. S. CHASTAIN; W. C. WORRILL, for defendant.

SPEER, Justice.

This was a claim case arising from the levy of a fi. fa. in favor of John L. Hardee vs. T. J. Brown, defendant in fi. fa., on a certain tract of land lying in Randolph county, to which T. J. McMichael interposed a claim.

On the trial of the cause, it appeared that the judgment on which the fi. fa. issued bore date in favor of the plaintiff against the defendant on the 16th day of November, 1869; that the fi. fa. thereon issued 22d November, 1869, and was levied on the land in controversy on the 7th May, 1873. The testimony on the trial showed that the claimant had purchased the land of the defendant in fi. fa. either in 1868 or 1869; that he purchased it in two payments, one-half cash and the other half at twelve months; that on making the cash payment he received a bond for titles from the defendant in fi. fa., and when he received

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a deed to the land, in December, 1869, he paid the amount due on his note, being the second payment.

The two material questions in the case are,

- (I) Whether the court erred in his charge when he instructed the jury, "that if claimant was in possession of said land under a bond for titles, and had paid a part of the purchase money, and given his note for the balance, before the rendition of plaintiff's judgment, then claimant had a perfect equity and the land is not subject to said judgment, though the payment of the purchase money was not completed until after the rendition of the said judgment."
- (2.) Was the title of claimant protected by the statute of limitation of four years under actual possession as a bona fide purchaser?
- 1. As to whether a vendor, who sells land and executes a bond for title to his vendee, receiving part of the purchase money, has such an interest left in the land sold as to be the subject matter of levy and sale against him, is a question upon which the authorities in other states are by no means harmonious. This court has ruled, that where a vendor sells land, and gives bond for titles, and the notes given for the purchase money are transferred without endorsement or guaranty, the vendor has no such interest left in the land sold to which a lien of a judgment rendered after the sale would attach. 60 Ga., 388.

In the case of B. S. Ware vs. L. Jackson, 19 Ga., 452, a majority of the court held, Judge McDonald delivering the opinion, first, that a judgment is a lien on all the property of the defendant from its date; second, "if there is a good subsisting legal title in the defendant at the time of the judgment, the property is bound."

Here the evidence clearly establishes the fact, as proved by the claimant, that the legal title was in the vendor, Brown, at the time this judgment was rendered, for the claimant received his deed in December, 1869, when the judgment was rendered in November, 1869. We do not wish to be understood as determining that the whole of

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this land (were this the only defence) would be subject to this fi. fa. The purchaser, under a judgment against a vendor, like a purchaser from him by voluntary conveyance, succeeds only to the interest which the debtor had power to control or part with. He would only succeed to the right to call for the purchase money, due (as the representative of the vendor) at the time the lien attached. The amount of the purchase money due to the defendant, Brown, at the date of the judgment, would be the extent of the interest in the land the purchaser would hold under such a sale. 10 Ga., 117. We think the principle here ruled is also recognized in 49 Ga., 60; 60 lb., 388; 55 lb., 348; Code, §3586.

2. But it is insisted by counsel for defendant in error, that even if there was error in the charge as excepted to, still, under the evidence of four years' continuous possession of the land by the claimant as a bona fide purchaser before the levy, his title is protected. We do not say, even in the conflict of evidence on this point, there was not sufficient in favor of the claimant's title to sustain this verdict, still, the charge of the court, under his view of the law, left the jury no discretion as to their verdict, and made it unnecessary for them to consider this branch of the claimant's defence.

The court instructed the jury, "if claimant was in possession of the land under bond for titles, and had paid part of the purchase money, and given his note for the balance before the rendition of plaintiff's judgment, then claimant had a perfect equity, and the land was not subject to the judgment, though the payment of the purchase money was not completed until after the rendition of the judgment." This, in our opinion, was such error as requires a new trial.

Let the judgment below be reversed.

# CHURCHILL et al. vs. WALKER et al.

- 1. Where the petition to allow an information in the nature of a quo warranto to be filed has been granted, and the information has been filed by the solicitor general, the state is a party to the proceeding, and on exception to the judgment dismissing the case, the state is a necessary party to the bill of exceptions.
- The title to an office will not be tried at the instance of a claimant thereof after his term has expired and no judgment of ouster can be pronounced.
- Every citizen of a town has an interest in its municipal offices which will support a quo warranto proceeding to test the right of incumbents thereto.
  - JACKSON, C. J., concurred dubitante as to this point.
- 4. A municipal corporation is a creature of legislation, and its modes of government and the officers conducting the same may be changed by the legislature.
- 5. The legislature has power to pass all acts not forbidden by or obnoxious to the constitution, and the presumption is in favor of the constitutionality of such acts until they are clearly shown to be unconstitutional.
- 6. By the constitution of 1868 the legislature was authorized to provide for the creation of county commissioners in such counties as might require them, and to define their duties. That commissioners were created for a county in which was located the town of Darien, and one of the duties put upon them was the exercise of the corporate authority of such town, was not unconstitutional.
- (a.) The act of 1871, creating a board of commissioners for the county of McIntosh (Acts 1871, p. 265), is not unconstitutional as containing more than one subject matter or matter different from the title of the act.

Practice in Supreme Court. Officers. Actions. County Matters. Constitutional Law. Before Judge FLEMING. McIntosh Superior Court. July Term, 1881.

Reported in the decision.

JNO. L. HARDEN; H. M. LAW, by E. F. HOGE, for plaintiffs in error.

LESTER & RAVENEL; TOMPKINS & DENMARK; W. R. GIGNILLIAT, for defendants.

SPEER, Justice.

The record discloses that at an election held on the 20th of April, 1881, the plaintiffs in error were elected to the offices of mayor and aldermen of the city of Darien.

As such officials elect they filed their petition in the superior court of McIntosh county, asking leave to file an information in the nature of a quo warranto against James Walker and others, defendants in error, who have been, and still are, exercising the powers of mayor and aldermen of the city of Darien under the acts of the general assembly of 1871 and 1876, creating the board of county commissioners. Petitioners allege that said acts, so far as they intended to confer corporate powers over the municipality of Darien on said board of commissioners, were unconstitutional and void. That the charter of the city of Darien never having been repealed, plaintiffs in error were entitled to hold and exercise the office of mayor and aldermen of said city of Darien under and by virtue of their election aforesaid.

Plaintiffs in error further by their petition claim that, as residents and citizens of said city, they were interested in the good government of the same, and that outside of their interest as officers elect, and apart and distinct from the same, this latter interest was sufficient to entitle them to have leave to file information, and to prosecute the same to inquire into the authority and warrant by which the defendant in error claimed to exercise the office of mayor and aldermen of said city of Darien.

To this petition the defendants in error filed their demurrer on various grounds as set forth in the record. On calling up the demurrer, counsel for plaintiffs in error moved to strike therefrom so much as raised issues of fact, which motion the court sustained and also granted leave to file information. The order granting leave accorded to

defendants in error the privilege of filing a demurrer to petition after filing the information. The information was filed accordingly with allegations similar to those of the petition, and the writ was issued and served upon defendants in error. A demurrer was then filed within five days by the defendants after the service of the writ upon them, on the following grounds:

- (1.) That the information was not filed at a term of the court.
- (2.) Because respondents were called upon to answer within five days after service of information and writ upon them.
  - (3.) That there is no writ of quo warranto.
- (4.) No sufficient allegations showing the right of relators to hold the offices claimed.
- (5.) That the allegations are not sufficient for the court to pass judgment upon.
  - (6.) Relators have no right to the offices claimed.
- (7.) There is no law authorizing an election for mayor and aldermen of the city of Darien.
- (8.) Respondents are the only persons authorized to exercise the powers of mayor and aldermen of the city of Darien.
  - (9.) Relators show no interest in the offices claimed.
- (10.) The allegations are not sufficient to warrant a judgment of ouster.
  - (11.) That relators cannot jointly maintain this action.
- (12.) Relators do not show for what length of time nor for what terms they have been elected.

On hearing the demurrer, the court sustained the same, and ordered the writ of *quo warranto* to be dismissed, which is excepted to and assigned as error.

1. As to the motion to dismiss this writ of error because the state is not a party to the same, we have to say that we think, as the information is filed by the solicitor general as the officer of the state in the Eastern judicial circuit, and for the state, and could be filed in no other

name but that of the state, we cannot see that the state was not a necessary party here. It is not a party, because its officer does not sign the bill of exceptions for the state nor do other counsel as representatives of the state. But as we think it best to dispose of the case on the merits we will pass upon the other points.

2, 3. It is insisted that, as the alleged official terms of the relators to the office of mayor and aldermen of the city of Darien expired in November last, and by virtue of which they sought the issuing of this writ of quo warranto, this court should not proceed further, as the relators could not have a judgment of ouster against respondents and of induction for themselves. It is true that this court, in the case of Morris vs. Underwood, 19 Ga., 559, held, "The title to an office will not be tried when the term has expired, and no judgment of ouster can be pronounced." But it must be observed that these relators apply for this writ not only as claimants to the offices in controversy, but they also claim as resident citizens of said city of Darien, apart and independent of their claim as officers elect. "The writ of quo warranto may issue to inquire into the right of any person to any public office the duties of which he is in fact discharging, but must be granted at the suit of some person either claiming the office or interested therein." Code, §3203.

It is clear, from this provision of the Code, that persons other than the contesting claimant to the office may apply for the issuance of this writ. Are not resident citzens of a municipality interested in the offices through which the civil government of the city is administered? Are they not interested in having such offices legally filled, honestly and impartially administered? These offices are created by law for the benefit and convenience of the citizens, and if any usurper should assume their duties, can redress be had only through a contestant claimant? We think not. We think the right of a citizen, as such, to seek the services of this writ, is impliedly recognized by

this court in the case of Hardin vs. Colquitt, 63 Ga., 588. The court there said, "The claimant of an office controverting an actual incumbent, though he cannot be heard by quo warranto to attack the legality of the election without alleging an interest in the office as a citizen or otherwise, may nevertheless have a hearing upon such part of the case made as involves the question of whether he or the incumbent received a majority of the legal vote." The court said further, "Had the relator averred himself to be a resident of the district, and thereby interested in the office, both branches of the petition could have been used on the trial." So in the case of Collins vs. Huff, 63 Ga., 208, this court said, "The application for leave to file the quo warranto rests purely upon the title of Collins to the office of mayor of Macon, by virtue of the election, the legality of which he attacks. He shows no interest in the office as a citizen or otherwise, on the face of the application." We conclude, therefore, though the interest of these relators as contestant claimants for the offices may have expired by lapse of time, their interest as resident citizens of Darien continues, and that relation to this municipality gives them such an interest in its offices as entitle them to seek and maintain this application.

4, 5, 6. But after all, the important question involved in this controversy, on which these relators rest their claim to oust the respondents, and upon which the respondents rest their right to exercise the duties of these offices, is upon the acts of the general assembly passed in 1871 (pamp., p. 265), and of 1876 (pamp., p. 283), creating commissioners for McIntosh county, with power conferred on said commissioners to exercise the rights, powers and privileges of the mayor and aldermen of the city of Darien, as conferred by the charter. The relators insist that said acts are unconstitutional and void, while on the other hand the respondents claim to hold and execute the duties of these offices by authority of said acts.

It appears by the record the judge below based his

judgment, sustaining the demurrer to this writ, on the ground "that the respondents were entitled to hold these offices under said acts, and that they were constitutional."

The corporation of the city of Darien is the creature of the general assembly. That creative power may dissolve, modify, or limit its corporate powers at will. Code, §1681; 6 Ga., 130; Dillon Mun. Corp., vol. 2, section 52. All acts of the legislature are presumably valid and constitutional, and this presumption is a conclusive one, unless it can be shown that the act is prohibited by the constitution. The legislative authority is supreme, except where limitations have been placed upon it, either by the constitution of the state, or the United States. If, therefore, it cannot be shown that the legislature is forbidden to pass such acts as these, they must stand valid, and it must not only be shown, but clearly and manifestly shown. If the matter is the least doubtful courts will uphold the constitutionality of the acts. 9 Ga., 253; 44 1b., 649.

By the constitution of 1868, in force when these acts of 1871 and 1876 were passed, it was provided, "The general assembly shall have power to provide for the creation of county commissioners in such counties as may require them, and to define their duties." Code, §5127.

The act of 1871 is entitled, "an act creating commissioners for the county of McIntosh, to define their powers, duties, etc., and for other purposes." These duties and powers conferred upon these commissioners are defined, and among them is "the exercise of the corporate authority of Darien." There is no limit on the power of the legislature to create commissioners and define their duties. 52 Ga., 233, 239 (5); Ib., 621; 59 Ib., 364. The subject matter of the act of 1871 is to create commissioners and define their duties. It creates only one board, and in defining their duties gives them control over Darien. As the duties may be defined without limit, any duty defined is necessarily within the scope of the title and embraced in the subject matter. The act, then, is not

subject to the objection that it embraces two subjects matter, or that the body differs from the title, and in this respect is unlike the act construed in 51 Ga., 571, which was an act granting three separate and distinct charters, and in 61 Ga., 20, which was an act incorporating two separate and distinct towns in different counties.

The act of 1876 is entitled, "An act to create a board of commissioners for the county of McIntosh and city of Darien, and to define their powers and duties." Here, then, is found full accord between the title and body of the act. The subject matter of the act of 1876 is to create one board of commissioners for the county of McIntosh and city of Darien. Really the acts of 1871 and 1876 are the same in scope and purpose—to create commissioners to perform certain duties, and among them is the duty of administering the municipal government of Darien.

But the acts of 1874, pam., 190; 1877, pam., 260, likewise give these commissioners the power over the city of Darien. These acts all, in pari materia, should be construed as one system, and they show one comprehensive design—to organize a constitutional board of commissioners, empowered to administer the municipal government of Darien.

With these views of the constitutionality of these acts and their validity and force, we do not think the court below erred in sustaining the demurrer of respondents and dismissing the writ of *quo warranto*.

Judgment affirmed.

# MOON vs. THE STATE OF GEORGIA.

1. When the panel of jurors is put upon the prisoner, he should challenge the array for any cause which would go to show that it was not fairly or properly put upon him. If he fails to do so, it appearing that a full panel, answering to their names, have been put upon him, it will then be too late to object to the array because the name of one of the jurors had been incorrectly written on the list.

- (a.) If upon discovering the error in entering the juror's name, by consent the question thus raised be submitted to the court, his decision as a trior is final, and will furnish no ground for a new trial.
- 2. A diagram illustrating the scene of the crime, having been proved by witnesses to be correct, was admissible. That witnesses for the defence denied its correctness, did not render it inadmissible. The defendant could introduce a diagram in accordance with their testimony if he so desired.
- (a.) That certain lines on the diagram were drawn in red ink did not render it objectionable, as calculated to inflame the minds of the jury.
- The bullets extracted from the body of the deceased, when properly identified, were admissible in evidence.
- 4. It is not competent to prove the conclusions of a witness from facts, without stating them.
- 5. When a new trial is asked on the ground of partiality in a juror, the onus is on the movant to show such fact. A juror so attacked may sustain his competency, and the decision of the court on such conflicting testimony will not be reversed unless decidedly wrong.
- (a.) Especially will the position of a juror in regard to a case not be a ground for new trial where it was known to counsel for the defence before the trial.
- 6. A charge that drunkenness could be looked to, to ascertain and determine the condition and state of defendant's mind, and throw light upon the question of the existence of malice, was fully as favorable to the defendant as the court could give.
- To kill by using a deadly weapon in a manner likely to produce death, will raise a presumption of intention to kill.
- 8. Positive testimony outweighs negative testimony, the witnesses being equally credible.
- 9. A definition of malice in the language of the Code was not error.
- 10. The eleventh ground is controlled by the sixth head-note above.
- A ground for new trial abandoned in this court will not be considered.
- 12. Where an affidavit presented on the hearing of a motion for a new trial was not sworn to in form, but was followed by another affidavit of the same person which practically verified it, there was no error in considering it.
- 13. The verdict was sustained by the evidence.

Criminal Law. Jurors. Practice in Superior Court.

Evidence. Presumptions. Practice in Supreme Court. Before Judge HARRIS. Carroll Superior Court. October Term, 1881.

Moon was indicted for the murder of J. D. Ward. On the trial, the evidence for the state was, in brief, as follows:

The defendant cherished ill feeling against the deceased on account of some previous misunderstanding between them. On January 4th, 1881, he purchased a shot-gun and ammunition, and made threats to several parties that he intended to kill Ward. On the evening of January 4th. between sundown and dark, he was at the house of one Robinson when Ward, accompanied by one Stevens, came along a path in front of Robinson's gate. Defendant, taking his gun from his shoulder, called out to them to halt and tell their names; they did not at first answer. and he again demanded to know who they were; they answered "Stevens and Ward;" he said, "All right, your friend:" thereupon they went up to him. Ward being a little in the rear of Stevens; upon seeing Ward near at hand, defendant cursed him and stated that he would kill him; on being asked why, he said, "Ward had acted a God damned rascal." Ward thereupon seized defendant's gun; the latter, struggling slightly, told him to turn it loose. Ward asked if it was loaded; defendant replied in the negative, and again demanded that he should turn Ward asked, "If I turn it loose, will you let me it loose. alone?" Defendant replied, "Yes." Ward then let go the gun, and started to climb over the fence. Defendant walked off about fifteen steps, turned and saying, "God damn you, I will kill you," fired upon him, and from the effect of the shot deceased died in about thirty-six hours. The gun was loaded partly with buck-shot and partly with small shot. After deceased fell, defendant ran up for the purpose of shooting again, but was told not to do so, and desisted. During the struggle over the gun John Robinson, a son

of the owner of the premises, came out of the house with a fire-shovel in his hand, and in the semi-darkness seeing one of the parties shoot the other, he threw the shovel, which struck defendant on the head, inflicting a slight wound. After the shooting, Stevens took the gun from the defendant, and also a pistol which he endeavored to draw, and kept him under arrest until the arrival of the sheriff. Defendant had been drinking for some time, and had not been sober for several weeks before the homicide; and for about a week he had been suffering from attacks of delirium tremens; he boarded at Robinson's house. Ward had a trunk there, and was going to get some to-bacco when the difficulty occurred.

The evidence on behalf of the defendant was, in brief, as follows:

Defendant purchased the shot-gun and ammunition for the avowed purpose of hunting; he fired it several times in company with his friends on the road home. While standing near the gate talking to a daughter of Robinson, Stevens and Ward approached: defendant inquired who they were; they replied, "Stevens and brother." He replied, "All right, boys, come on," and turned back to talk to Miss Robinson. Stevens and Ward approached, and the latter seized hold of defendant's gun; defendant said, "John, I thought it was Stevens and brother." Ward replied, "It is a damned lie, and I intend to kill you," and thereupon snapped a pistol in his face; the pistol failing to fire, Ward handed it to Stevens, saying, "Here Jim, take this, I have got one that never fails:" defendant jerked loose from Ward; the latter knocked him down with a stick and started to get over the fence. Defendant said he had been struck with a slung shot; Stevens said no, it was a piece of iron, and calling out, "Hold up, he is going to shoot you," grasped the gun, which defendant had in his hands. Defendant was on his knees at the time from the blows he had received. As Stevens took hold of the gun, it was dis-

charged, and Ward was shot. After the shooting defendant made no effort to escape, but stayed by Ward until the sheriff came; defendant then said they were going to take him to jail, and asked Ward if he desired it; the latter said, "No." Defendant's pistol was in the house during the difficulty.

There was much conflicting testimony concerning the details of the transaction, statements previously made by the witnesses and the like, which it is not necessary to set out here; there was also some testimony on behalf of the defendant to show previous threats of the plaintiff to whip and kill him. The jury found the defendant guilty; he moved for a new trial, which was refused and he excepted.

The grounds of the motion are sufficiently stated in the decision, except the eleventh and fourteenth, which were as follows:

(11.) Because the court refused to charge the jury that they might consider the drunkenness of defendant to determine the question as to whether the defendant acted from malice previously entertained, or provocation given at the time of the rencounter.

Because on the hearing of the motion for new trial the state's counsel offered to read in evidence the affidavit of G. W. Merrell, which was not sworn to, and defendant's counsel objected to the same. The court overruled the objection and admitted the same in evidence, on the ground that the affidavit following was sworn to by said Merrell. [This affidavit was concerning the partiality of one of the jurors. The record shows a writing in the form of an affidavit signed by G. W. Merrell, but without the signature of an officer, in which the deponent states that he heard a conversation prior to the trial between the juror, Power, and counsel for defendant, in which Power stated that he had been summoned on the jury, that he had nothing against the defendant and had heard no evidence on oath; but if reports were true he had a mighty bad

case; that he had neither formed nor expressed an opinion, and did not expect to until he heard the evidence on the trial; that he was prejudiced against the crime of which defendant was accused, and if a bad case was made out against him, he would be in favor of hanging him.

J. L. COBB; W. P. COLE; E. B. MERRILL; G. W. AUSTIN; T. W. LATHAM, for plaintiff in error.

C. Anderson, attorney general, by brief; H. M. Reid, solicitor-general, for the state.

SPEER, Justice.

Plaintiff in error was indicted for the offence of murder, of which he was convicted by the jury. He made a motion for a new trial, which was overruled, and he excepted.

- (1.), (2.) The first and second grounds of the motion were, the verdict was contrary to evidence and to law and the charge of the court.
- (3.) Because there were not 48 jurors empanelled and put upon prisoner. It appearing there were 24 jurors of the regular panel and 24 tales jurors. The name of M. D. Reid appearing as number three of the regular panel, the solicitor general announced there was no such man on the jury; the man on the jury was named Newton D. Reid; when his name was called in its order, the court asked counsel for defendant if they would consent that the court might decide the question; they consented and the court set him aside. The jury was selected out of the balance of the panel.

- (4.) Because the court admitted a diagram of the scene of the homicide, as proved to be correct, in evidence before the jury.
- (5.) Because the court admitted in evidence the bullets identified as those taken from the body of the deceased.
- (6.) Because the court sustained the objection to the following question propounded by defendant's counsel to William Allen, a witness: "What were your opportunities, and whether your opportunities would have been as good as any other person's to have heard any threat made by Moon?"
- (7.) Because one of the jurors, D. P. Power, was at the inquest and witnessed the post-mortem examination, and saw the physician take out the bullets; that he expressed his opinion on the evidence and misled counsel for defendant, and because of his partiality and bias.
- (8.) Because the court charged the jury as follows: "If a deadly weapon is used to accomplish the killing, which is likely to produce death in the manner the proof shows it was used, the law presumes the person using it intended to kill."
- (G.) Because the court charged the jury as follows: "Express malice is that deliberate intention unlawfully to take away the life of a fellow-creature which is manifested by external circumstances capable of proof, such as lying in wait to do the act, threats, previous grudges, preparation for committing the act on the part of the slayer and acts of similar nature."
- (10.) Because the court charged: "Voluntary drunkenness is no excuse for crime, and will not of itself reduce a killing from murder to voluntary manslaughter or any grade of homicide. Yet, it is a fact, that may be proved and looked to, to ascertain and determine the state and condition of the defendant's mind at the time, and to throw light on the inquiry as to whether there was malice or not on part of defendant, in determining as to whether or not

the homicide should be reduced from murder to a lower grade of homicide"

- (11.) Refusal to charge (request not in writing).
- (12.) Abandoned on argument.
- (13.) Because the court charged as follows: "It is the rule that positive testimony is to be believed rather than negative testimony, even when the witnesses are equally credible, that is to say, where a witness says he saw a transaction take place, it is to be believed that the transaction took place, rather than to disbelieve that the transaction took place, because the witnesses say that they did not see it, though they had the same opportunity of seeing it."
- (14.) Because, on motion for a new trial, state's counsel offered and read in evidence the affidavit of G. W. Merrell, which was not sworn to, and defendant's counsel objected to the same; the court admitted the same in evidence on the ground that the affidavit following was sworn to.
- I. The record shows that the panel of jurors put upon the prisoner consisted of twenty-four jurors of the regular panel and twenty-four tales jurors. So that the error assigned in the third ground of the motion is not sustained by the record. It is true, that one of the jurors upon the regular panel was entered by the name M. D. Reid, instead of his real name, Newton D. Reid. It was the duty of the prisoner, when the panel of jurors was put upon him, to challenge the array for any cause going to show that it was not fairly on properly impanelled, or ought not to be put upon him. So that the court could then determine the sufficiency of the challenge at once. Code, §4680.

But he having failed to do this, if it should appear that there was a full panel answering to their names put upon the prisoner, it is too late to object for this cause to the array, because one of the juror's names has been incorrectly entered on the list, and which is discovered thereafter.

It has been held by this court that it is no ground for new trial that the panel put upon the prisoner does not number forty-eight, if he does not object at the time the panel is put upon him. 22 Ga., 546. If there be not a full panel the challenge should be made to the array. 27 Ga., 287.

The prisoner having consented that the court might decide the question of the competency of the juror appearing under a misnomer, his decision as trior in a criminal case, upon the question of fact submitted to him as such, is final and conclusive; and cannot be ground of motion for new trial. 27 Ga., 287, 289, 294; 47 Ib., 598.

- 2. There was no error in admitting the diagram drawn to illustrate the scene of the homicide. Witnesses familiar with the locality testified as to its correctness, and if the witnesses for the defence did not agree as to its accuracy with the witnesses for the state, it was the privilege of the counsel for the prisoner to have one prepared in accordance with their testimony, and submit the same to the jury in rebuttal. Neither do we see any objection to the diagram, "because the part of it was drawn in red ink as suggestive of the bloody deed, and as calculated to inflame the minds of the jury." The scene and circumstances attending this terrible tragedy in the simple recital of the eye-witnesses is presented in colors of deeper stain than the mere sketches of red lines or other figures upon the diagram exhibited.
- 3. The bullets taken from the body of the deceased on a post-mortem examination, identified as they were, were also admissible. They were the voiceless, yet nevertheless significant, evidences of the intent that prompted the slayer when he fired the fatal shot.
- 4. The question objected to and ruled out by the court as set forth in the sixth ground of the motion, propounded to the witness, Allen, was incompetent, since it sought from the witness his opinion and conclusions of facts about which he had not testified. Code, §3867. Hopkins' Penal Laws, 633.

5. As to the competency of the juror, Power, on the ground that he was at the inquest and witnessed a part of the post-mortem examination, and also that he had expressed himself soon thereafter "that he would hang the prisoner if on the jury;"—while it may be true he was at the inquest, there is no proof in any of the affidavits submitted to impeach his competency as a juror that he heard one word of the testimony taken on said inquest. juror himself most positively denies by his affidavit that he saw the crime committed, or heard any part of the evidence delivered on oath, or had from either of these causes formed and expressed any opinion as to the guilt or innocence of the accused: but states that his mind was brought to a conclusion of prisoner's guilt after he was sworn and heard all the evidence. That he had no bias or prejudice resting on his mind. That he had spoken freely in the presence of the prisoner's counsel before he was taken on the jury, and warned them that he was in favor of capital punishment; that he told them if he was taken on the jury his mind was impartial—if innocent he would acquit defendant, if guilty convict him, and that he never expressed himself to any one as to the guilt of the prisoner except in that qualified way. It is a well settled rule that a juror whose integrity and competency is thus assailed after verdict may vindicate himself by affidavit. 7 Ga., 143. And when the assault is thus made, it is but just that the juror may be heard in his own vindication, and when so heard the court will stand in the position of a trior, and if he should pronounce him, from all the proofs submitted, a competent juror, it will be no sufficient ground for new trial, unless there was decided error in the judgment so pronounced. 7 Ga., 143; 15 Ib., 223. Even loose remarks made by a juror before he is sworn work no disqualification if they are explained after trial by affidavits and he is shown to be impartial. 60 Ga., 258. Moreover, when the competency of a juror for partiality is assailed after verdict, the burthen is upon the one who attacks him; all

the presumptions of law are in favor of his competency. 18 Ga., 343; 19 Ib., 123.

After carefully examining the affidavit submitted to the court below on this issue, and when the record shows that the juror freely communicated his views to the counsel for prisoner several days before the trial, in full accord and harmony with those set forth in his affidavit, which is not denied by the counsel, but sustained by the affidavits of other witnesses who were present, we are not prepared to hold that the court below erred in overruling this ground of the motion. On such an issue of competency of a juror, great deference is properly due from a reviewing court to a judge before whom such a trial is had, and who sees or hears the witnesses and looks upon the surroundings of such an investigation.

- 6. The charge of the court upon the subject of the drunkenness of the prisoner, as complained of in the eleventh ground of the motion, was fully as favorable to defendant as he could expect. The rule laid down: "That drunkenness could be looked to, to ascertain and determine the condition and state of the defendant's mind, and thus throw light upon the inquiry whether there was malice on the part of the defendant in the perpetration of the act charged," was fully as far as any decision on this point has extended in behalf of a party on trial. Malone vs. State, 49 Ga., 211; and even this has been since questioned by more recent decisions. 59 Ga., 174.
- 7. As to that portion of the charge of the court complained of in the eighth ground of the motion, to-wit: "If a deadly weapon is used to accomplish the killing which is likely to produce death, in the manner the proof shows that it was used, the law presumes the person using it intended to kill." The objection made to this portion of the charge is that the court therein expressed an opinion on the proof submitted.

Wrested from the context of the charge, it would at first blush seemingly bear such a construction. But these same

words, used just as here set forth in the case of Hanvey vs. State, at the present term, were held by this court not to be error in a charge as there given. The court was instructing the jury generally as to legal presumptions arising or flowing from certain acts. The judge said: "If a deadly weapon is used to accomplish the killing which is likely to produce death, in the manner the proof shows it was used, then the law presumes," etc. By this he instructed the jury that the mere use of the deadly weapon to accomplish the killing would not raise the presumption the accused intended to kill: but one further fact must appear, he must use it in a manner also likely to produce death. The proposition was a two-fold one: first, the deadly weapon must be used with intent to kill, and secondly, in a manner to kill. To strike one a blow with a knife (a deadly weapon) closed, would not raise a legal presumption of intention to kill, and yet one might so strike wishing to kill. Yet if he struck with a knife open, then it would be used in a manner to kill, and being with a deadly weapon, the legal presumption be, he intended to kill. Up to this part of the charge no application of the general principles he was submitting had been made to the case at bar, and therefore no reference to the proof in the case could have been intended as complained of in this ground of the motion.

- 8. We see no error in the charge on the effect of positive and negative testimony, as it is set forth and assigned as error in the thirteenth ground of the motion, but the same was correct as given. 14 Ga., 55, 62; 27 Ib., 649; 42 Ib., 474; 12 Ib., 213.
- 9. The charge complained of in the ninth ground is in the language of the Code, and was not error.
- 10. There was no error in refusing the charge asked for in the eleventh ground; the charge on the subject of drunkenness was given as fairly and liberally as the law warranted.
  - ·II. The twelfth ground is abandoned.

- 12. There was no error in considering the affidavit of Merrell on the motion, it was practically verified by the superadded affidavit attached, and which was sworn to by him.
- 13. Having thus disposed of all the grounds except those statutory grounds of the verdict being contrary to law and evidence, etc., we do not deem it necessary to enlarge upon these. The picture of this bloody drama, as presented by this record, reveals no ground of palliation for the enormity of this offence. If the testimony is reliable, this murder was committed with a premeditation and preparation that makes it wilful murder. The gun is purchased; deadly loads of bullets procured, threats made, and purposes disclosed, until the tragedy is consummated by deliberately shooting his victim as he was retiring from him unconscious of his peril and unaware of offence given. If this is not murder, the crime is unknown to the criminal jurisprudence of our state.

Judgment affirmed.

# BAKER vs. THE WESTERN AND ATLANTIC RAILROAD COMPANY.

- If an employéof a railroad company be injured without fault or negligence on his part through the negligence of another employé, he may recover.
- 2. It is the duty of a railroad company to furnish its employés reasonably safe tools and materials for their use in its service, but an employé who is aware of the dangerous condition of any particular tool or instrument, and nevertheless uses it, cannot have redress for an injury resulting therefrom.
- Nor will the fact that the employé knowingly undertook to use a dangerously defective tool under the immediate command of a superior employé, give him a right to recover.
- A question not made in the court below will not be considered here.

Railroads. Damages. Negligence. Master and Serw 68-46

vant. Before Judge FAIN. Catoosa Superior Court. August Term, 1881.

Reported in the decision.

W. K. MOORE; JAS. HUNT, for plaintiff in error.

W. H. PAYNE; R. J. McCAMY, for defendant.

SPEER, Justice.

This was an action brought by plaintiff in error as an employé against the defendant to recover damages resulting to the plaintiff by reason "of injuries he sustained in an injury to his eye caused by a small piece of iron or steel flying off from the stroke of a heavy hammer upon a cleaver, striking him in his eye and becoming imbedded in the pupil or ball of his eye. He alleges that he was, at the time of the injury, holding the cleaver, and they were cutting a bar to fit on the track, and the hammer and cleaver used on this occasion were both unfit instruments to be used for said purpose of cutting bars-both being worn and part of the face of the hammer, more particularly the front part, being broken and worn off so as to cause the hammer to bounce and slip and knock or throw off other parts of the face thereof, and the cleaver being much battered and worn; and the injury aforesaid was occasioned by the use of said improper and unfit tools. That the defendant knew, and the proper officers knew, that the tools were unsafe and worn as aforesaid, and had been notified of their condition by plaintiff and others, but had failed to repair them." He further avers that the defendant and its officers and employes, including the track boss, were guilty of negligence in failing to keep their tools in proper repair and fit for use, and in failing to order their work carried on in such a way as not to hurry the hands while using defective tools, and that the failure and omission of duty as alore-

said of defendant's employés while carrying on the work as aforesaid, caused the serious injury to be inflicted upon plaintiff as complained of, and that plaintiff was without fault in the premises, etc.

Baker, the plaintiff, testified "that he was injured about the time alleged; had been in defendant's employment about six months at that time. That on the day of the injury the hands were returning, on account of rain, to their shanties. That Mitchell, the boss of the hands, discovered one of the iron rails of the track was broken about a foot from the end. The boss told witness to get a cleaver off the dump car, and told another hand to take the sledge and cut a bar of iron lying near the broken rail so as to fit it in place of the broken rail. Told the striker to give it h-l, as the passenger train would be due in fifteen minutes; went to dump car and got hold of the only cleaver he could find sharp enough to cut the bar; there were others there, but they were too dull; the one he took was battered almost down to the eye but had been recently ground. The usual hammer used in cutting bars was the striking hammer; the sledge then used was a good deal heavier and was used generally in breaking off the bar after it was cut. The edges of the hammer were broken and its surface uneven; it was used in striking the cleaver when they were in a hurry—sometimes to strike the cleaver in cutting bars of iron, and there was more danger in using it with its uneven face than if it had been smooth and even, and he knew this at the time. He had complained to the boss some time before this more than once that the tools were not in good order, and the boss had told him he would have them all sent to the shop and repaired at the end of the quarter. That the road had offered a premium to the track boss who would keep up the best track at the least expense to the company, and he was trying to get it. Witness knew the condition of these tools, and knew they were more unsafe than they would be if kept in good order.

sledge had been in use about four months, and only used for cutting iron with when in a hurry. The striker was the strongest and quickest they had. Witness objected to the striking being done with the sledge at the time, just before he was hurt; but was uneasy about the train being wrecked and somebody hurt. He had worked on the road seven years in all. They were working in a hurry to get the bar on before the train came, and succeeded a minute or two before it came." Witness then described the extent of injury, pain, etc., and the cause of the injury as alleged in his writ.

Dr. Kirkpatrick, a physician, testified as to the injury and its extent and probable consequences to plaintiff.

Plaintiff having closed the court charged the jury:

(1.) That the Code provides that employés of railroads can sue for damages when there is no negligence on their part, but the injury occurs on account of some act of a co-employé. If the person suing is himself an employé of the company, and the damage was caused by another employé, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery. Prior to 1856 there was no right of action by an employé whatever when the injury was caused by the negligence of a co-employé; but the statute and its construction by the supreme court now There is but one ground upon which an employé can recover, and that is when there is no fault on his part—when he is entirely faultless. Therefore, the employé must exercise ordinary care and diligence to prevent an injury to his person—he must be wholly without fault. If both are at fault—if he contributes anything in the way of negligence and the co-employé is also at fault, then he could not recover. If neither are at fault, and the company show they have exercised reasonable care and diligence, then he could not recover, because it would be an accident. He must show he is without fault, and the burthen is upon him; but he can recover if

no fault is shown on his part whatever and there was fault on the part of the railroad company.

(2.) An employé under the law is presumed to be negligent if he works with tools he knows to be defective, and knows them to be dangerous. If the plaintiff, being a free man and having the right to manage his own conduct and person, continues to use tools or machinery that are defective and dangerous, then he could not recover: he knew of the danger of working with them, he could not recover at all, whatever the injury might be. The law, however, does provide the company shall keep tools in reasonably good repair for the business to be transacted That burthen is on the company. Still, if it with them. fails to do it, and it is known to the employé, then in using such tools he is not free from negligence. bound to exercise ordinary and reasonable care. Ordinary care is that care which every prudent man takes of his own property, or for the protection of his own person. That he is bound to exercise. If the employé did not know of the defects of this hammer, and it was such as ought not to be used, or if he did not reasonably know of these defects, and could not by the exercise of ordinary care and diligence know of them, if they existed, then he would be entitled to recover, unless the railroad company shows that the co-employé has exercised all reasonable care and diligence. No man can recover on account of his own negligence, and this you must determine from the testimony. If plaintiff was injured on account of the defective nature of the tools used by himself and other employés engaged with him, and he knew of the defective nature of the tools at the time he used them, then this was fault on his part which would prevent a recovery if the defective tools were the cause of the injury. While it is negligence on the part of the company to fail to furnish suitable tools, and it would be liable for the failure if the employé did not know their defective character, yet if

he did know of the defect, and the injury resulted from this cause, he cannot recover.

(3.) Neither does it change the case if the section boss directed the use of the defective tools, it still is negligence for the employé to use the dangerous tools, which will prevent recovery on his part. Neither would notice by plaintiff to his boss that the tools were defective and needed repairs relieve the plaintiff from blame in using them afterwards. He had the right to quit work or take the risk; and if he was hurt, he must take the consequences. If the tools, by reason of being out of repair, were more dangerous than being kept in repair, still if a person of ordinary prudence would, under the circumstances, have continued to use them, then the plaintiff would not lose the right to recover for an injury arising from the use of such defective tools.

(The balance of charge is as to the rule of ascertaining damages, of which there is no complaint.)

The main and only ground of error insisted upon here by counsel for plaintiff, is as to the charge of the court, above given in substance.

The charge embraces, when analyzed, three propositions of law:

First: The right of action given to an employé to recover against the common master, in this case the railroad, for the fault or negligence of a co-employé.

Second: The right of an employé in such a case to recover where he works with defective and unsuitable tools, which are the cause of the injury, if he knows at or before the time of the injury that they are defective and unsuitable.

Third: The right of the employé to recover who may be injured by unsuitable tools, whose unfitness he has knowledge of, if he does such work by the direct command or order of his superior employé.

We have given a brief and yet sufficient synopsis of the testimony on the trial to show that the evidence in

the case invoked instructions on these different propositions of law that were submitted by the court to the jury.

The evidence showed a case in which the plaintiff was injured by the use of defective tools, whose defective character was at the time well known to him, and that he used them under the order and command of his superior or boss employé, and that damage resulted from the use thereof to plaintiff.

1. As to the first proposition submitted by the court as to the right of the employé to recover against a railroad company, it was given in the language of the Code, and therefore cannot be error.

Code, §3036, establishes and fixes the rights of the employé to recover, and the liability of the road for an injury resulting from the fault or negligence of a co-employé so clearly, and the construction of this section has been so often before this court, that we do not think it necessary to enlarge upon it here. "If the employé injured is without fault or negligence, and the damage was caused by another employé, then he can recover, otherwise not." This rule, we think, was given by the court substantially and clearly to the jury, and there was no error in it.

2. Was the instruction of the court correct, as set forth in the second proposition as to injury resulting from defective or unsuitable tools?

It must be remembered that the court charged the jury that it was the duty of the railroad company to furnish to its employés proper and suitable tools to perform the work assigned them, and the failure to do so was negligence on the part of the company. But notwithstanding this negligence, if the employé knew the tools were dangerous, unfit and unsuitable, if he nevertheless worked with them and was injured, then he was at fault and could not recover; but if, without this knowledge, he acted as a man of ordinary prudence and care, in working with such tools, and was injured thereby, he could recover.

We think the principle here charged was recognized by

this court in the case of the Central Railroad vs. Kenny, 58 Ga., 490, where the suit was brought for injury to the plaintiff by reason of the use of a defective hand-car of which he was in charge; this court said: "He cannot recover without making it appear that he did not discover the defect in time to avoid exposing himself to the danger, or that the defect was of such a nature as not to be discoverable in the reasonable and ordinary exercise of diligence in the course of his duty." So, in the case of Johnson vs. The Western and Atlantic Railroad Company, this court held, "Where an employé of a railroad company knowingly uses defective machinery, he cannot recover damages for injuries resulting therefrom." 55 Ga., 133.

So likewise in the case of *The Western and Atlantic Railroad Company vs. Bishop*, 50 Ga., 465, this court said: "It is the duty of a railroad company to furnish to its employés reasonably safe material and tools for their use in its service; but an employé who is aware of the dan gerous character of any particular tool or instrument, and uses it, cannot, if he is damaged, have redress by an action, especially if he had agreed to take upon himself the risk of his business."

The evidence in this case of the plaintiff establishes the fact that he was aware the implements he was engaged in using were unfit and unsuitable and dangerous, and with this knowledge he took the risk. Can it be said he was faultless?

3. But did the fact that he undertook this dangerous duty by the immediate order of his superior (the boss trackman) excuse him and relieve him from the rule that he must be without fault or negligence? This proposition was given in the case of *The Western and Atlantic Railroad Company vs. Adams*, 55 Ga., 279, by the circuit judge, but he was reversed, and this court held: "An employé cannot recover damages from a railroad company for injuries sustained by him on account of the negligence of a co-employé, unless without fault himself, even though

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in performing the act which resulted in the injury he was acting under the orders of a superior." Judge Warner in delivering the opinion said: "The statute makes no distinction between the grades or classes of employés of a railroad company, and therefore the courts are not authorized to recognize any such distinction, so as to enable the plaintiff to recover on the principle of contributory negligence, as assumed in the charge."

The point made before this court that the fault or negligence of this plaintiff was in consequence of an emergency that suddenly arose, and that made it imperative on him to use the implements so as to relieve himself from any imputed fault or negligence, does not, so far as the record shows, appear to have been made in the court below, by any request of the court to instruct the jury thereon. If such instructions had been asked and refused, or if asked and the jury had disregarded them, then it would have been our duty to consider them.

Taking the whole case together as to the law and facts within the record, we see no such error in the rulings or the verdict as authorizes us to interfere.

Judgment affirmed.

# FLOURNOY & EPPING vs. WILLIAMS.

- sayings of one member of an alleged partnership, not made in the presence of the others, or brought to their knowledge and assented to or ratified by them, are inadmissible to establish the existence of the partnership so as to bind the other parties.
- Sayings or writings of a party in his own favor, made in the absence of the other party, are not admissible on behalf of the person making them.
- 3. A charge not applicable to the facts of the case should not be given.
- (a.) Where an agent employs another to aid him in the conduct of his agency, the person so employed does not become a partner of the agent as to the principal, and the agent may sue the principal for commissions without joining such person with him.

Flournoy & Epping vs. Williams.

Evidence. Partnership. Charge of Court. Verdict. Before Judge WILLIS. Talbot Superior Court. September Term, 1881.

Reported in the decision.

SAMUEL B. HATCHER, for plaintiffs in error.

J. M. MATTHEWS; J. H. MARTIN, for defendant.

SPEER, Justice.

The plaintiffs brought their suit against the defendant to recover a balance alleged to be due, with interest, on account stated, attached as a bill of particulars. To this suit defendant filed a plea of set-off by account, in which he alleged plaintiffs were indebted to him for commissions due on seventy tons of guano sold for him at four dollars per ton. Under the evidence and charge of the court, the jury returned a verdict in favor of the defendant below for the sum of eighty-four dollars and eighty cents.

The plaintiffs made a motion for a new trial on several grounds, which was refused by the court, and plaintiffs excepted. The defence set up by plaintiffs to the account plead as a set-off by defendant, was that the defendant was not entitled to receive his commissions on the guano sold until all the guano notes were collected; that defendant guaranteed the collection on the guano he sold; that there was still unpaid a large amount of the guano sales made by defendant. That if they owed any one for the commissions on said guano sales, they owed Williams, Martin & Bro., as partners, and not Williams alone, and hence, the set-off pleaded was not a mutual debt between plaintiffs and defendant, and could not be pleaded as a set-off in this suit. Upon these two points the controversy in the case was heard.

1. The first ground of error assigned in the motion for

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new trial by plaintiffs was the exclusion of certain letters written by Martin & Bro., to plaintiffs, to establish the fact that the set-off pleaded was the debt of Williams, Martin & Bro., joint agents in the sale of the guano. The object of the letters thus offered was to establish the fact of a partnership between Williams and Martin & Bro. While we admit that it was both relevant and proper under the issue presented to establish this fact, yet we do not think the letters were admissible for such a purpose. Martin & Bro. were not parties to this suit, and the letters were not admissible as admissions. The question on this issue was, were Williams, Martin & Bro. partners in the sale of this guano for plaintiffs; and it is a well settled rule, "that the sayings or admissions of one of an alleged partership, not in the presence of the others, nor brought to their knowledge and assented to or ratified by them, are inadmissible to bind the other party, or establish the existence of a partnership." 44 Ga., 228. Partners are but agents, one for the other, and the declarations of an agent are not admissible to establish the fact of his agency, in the absence of his principal.

- 2. Neither was there error in ruling out the letters written by plaintiffs, in reply to the letters of Martin & Bro. They were simply the sayings of plaintiffs in the absence of the defendant, Williams, and were inadmissible.
- 3. Error is also assigned on the refusal of the court to charge as requested by plaintiffs in error, "If the jury believe from the evidence that Williams went to Columbus with the knowledge and consent of Martin & Bro., and at their instance, and made a contract with plaintiffs, who at the time knew that Martin & Bro. were to sell jointly with Williams, then the contract is with Williams, Martin & Bro., and it would not be necessary for Martin & Bro. to be present."

We cannot, after a careful examination of the testimony, see that the charge as requested was pertinent, or supported by the facts proved on the trial. The issue presented Flournoy & Epping vs. Williams.

was, whether there was a partnership between Williams and Martin & Bro., as to plaintiffs. It is an undisputed fact that the original contract was made between the plaintiffs and Williams, for him to sell this guano. Afterwards Williams seems to have interested Martin & Bro. as agents to aid him, as he claims, in the work. Admitting they were, as claimed by plaintiffs, joint agents with Williams, that of itself does not constitute them partners as to plaintiffs, if they were not embraced in the contract Williams made. If Williams made the contract alone with plaintiffs, and he afterwards engaged Martin & Bro. as his agents, to aid, the contract still was between him and plaintiffs, and he could collect on it without joining Martin & Bro.

Williams testifies he employed Martin & Bro. Such is also the testimony of Martin, and this is corroborated by Flournoy himself, one of the plaintiffs, and the bookkeeper, who testified that Williams contracted with the firm; and we find no evidence in the record that changes this contract, as between Williams and the plaintiffs, so as to make Williams and Martin & Bro., partners in their dealings with plaintiffs. We see, therefore, no relevancy in the charge asked for under the facts, but it only would have presented an irrelevant issue to the jury, without aiding them to a conclusion. The two simple questions in this case were, did the defendant, Williams, guarantee the collection of the guano debts contracted, as claimed by plaintiffs? Second, were the parties who sold this guano partners, as to these plaintiffs, in any contract made with them that would make the debt due for commissions on sales had a debt due to them as partners, and, therefore, not such a debt as defendant, Williams, could plead as a set-off to plaintiffs' suit?

On both of these issues of fact, under the evidence, the jury have passed, and, we think, admitting it is conflicting, there is sufficient evidence to sustain their finding, and as the law of the case was fairly given in charge, we see no legal reason for disturbing the verdict.

Judgment affirmed.

- Gurnee, Jr., & Co. vs. Speer, treasurer.

# GURNEE, Jr., & Co., vs. SPEER, treasurer.

[This case was argued at the last term, and the decision reserved.]

- I. It is the duty of the state treasurer to keep safely the funds of the state, and to pay out the same only upon the warrants of the governor, when countersigned by the comptroller general, excepting drafts of the president of the senate or speaker of the house for sums due to the members or officers thereof. It does not become a ministerial duty on his part to pay bonds of the state until an appropriation shall have been made for that purpose, an executive warrant issued and countersigned by the comptroller general; and these are conditions precedent to the grant of a mandamus to compel payment by him.
- 2. Article VII, section XIII, paragraph I of the constitution of 1877, which declares that the proceeds of the sale of the Western and Atlantic, Macon and Brunswick, or other railroads held by the state, or any other property owned by the state, whenever authorized to to be sold, shall be applied to the bonded debt of the state, and to no other purpose, does not amount to a specific appropriation or application of funds to any particular bonds, so as to authorize their payment directly by the treasurer.
- 3. The act of 1875 is not unconstitutional. It is merely a safeguard to prevent the payment of bonds which may have been already paid, and a means of detecting the spurious and separating them from the good. It neither repudiates bonds, nor takes away any remedy from the holder, nor impairs the state's obligation to pay any valid bonds.

Bonds. Officers. Laws. Constitutional Law. Treasurer. Before Judge HILLYER. Fulton Superior Court. May Term, 1881.

Reported in the decision.

C. C. KIBBEE; HOPKINS & GLENN, for plaintiffs in error.

CLIFFORD ANDERSON, attorney general, for defendant.

CRAWFORD, Justice.

This case comes before this court on the refusal of the judge below to grant a mandamus against D. N. Speer, the

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treasurer of the state of Georgia. The relators allege that they are the bona fide owners of twelve thousand five hundred dollars of the bonds of the state of Georgia, issued in 1840 and 1841, and due in 1870 and 1871; that the same were presented at maturity at the treasury for payment, which was refused, the state having failed to provide means for their redemption. That since that time the state has appropriated the money for the payment of these bonds, and their payment has been again demanded, but again refused, the treasurer referring to the act of the general assembly, approved March the 2d, 1875 as the ground of his refusal.

The answer of the treasurer to the rule to show cause denied the jurisdiction of the court to grant the mandamus prayed. And further answering said, that the bonds of the relators had never been registered as required by the act of the general assembly of March 2d, 1875, nor had the said act otherwise been complied with, and he was therefore prohibited by the said act from paying them, and he pleaded the same in defence of his refusal to pay. He admitted demand, and the sufficiency of money in the treasury with which to pay, but denied that any appropriation had been made, as the law prohibited the payment of the said bonds because they had not been registered as required by the aforesaid act of 1875.

1. The first question involved in this record is one of the jurisdiction of the court to grant a mandamus against the state treasurer. To determine this it is necessary to inquire whether the duty to be performed is ministerial only.

By the constitution of Georgia the officers of the executive department consist of the governor, secretary of state, comptroller general, and treasurer. The duties of these officers are defined by the constitution and the laws. That the treasurer shall pay no money from the treasury except by appropriation made by law is declared by the constitution in article III, section VII and paragraph XI.

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By the law he is to receive and keep safely all the money paid to him in behalf of the state, and to pay out the same only on warrants drawn by the governor when countersigned by the comptroller general, except drafts drawn by the president of the senate and the speaker of the house of representatives, for sums due the members and officers of their respective bodies.

How, then, without the executive warrant, is the treasurer liable to an absolute order by mandamus to pay out a dollar except as provided both by the constitution and law, that is, where there is an appropriation first made and afterwards upon executive warrant? If there were an appropriation made by the legislature, and the governor had drawn his warrant, and the treasurer were then to refuse to pay, the act of payment then being ministerial only, the power of the courts might be invoked by mandamus. It was held in the case of Decatur vs. Paulding, 14 Peters, 497, that "In general the official duties of the head of one of the executive departments, whether imposed by act of congress or by resolution, are not mere ministerial duties. The head of an executive department of the government in the administration of the various important concerns of his office, is continually required to exercise judgment and discretion." On this ground a mandamus was refused, Chief Justice Taney delivering the opinion.

In 6 Howard, 92, the same doctrine was laid down, and Justice Nelson says that, "The constitution provides that no money shall be drawn from the treasury but in consequence of appropriations made by law, and that all moneys appropriated for the war and navy departments are to be drawn by warrants of the secretary of the treasury upon requisitions of the secretaries of those departments, and then to be countersigned by the comptroller." He concludes by saying that it would not do to say that the mandamus would show the title of the relator to the pay, and whether there were any moneys in the treasury ap-

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plicable to the demand; for upon this ground any creditor would be enabled to enforce his claim by means of this writ, and the proceeding by mandamus would become as common as the action of assumpsit against individuals.

Again, in 17th Howard, 284; it was held that mandamus could only issue in cases where the act was merely ministerial, and in reference to which neither judgment nor discretion was left to the officer, in determining upon a matter of fact or of law.

We have seen by our constitution that the treasurer is the head of one branch of the executive department of the state. We have seen that he can pay no money out of the treasury except upon executive warrant, countersigned by the comptroller general. We have seen that under the constitution he can pay no money at all except by appropriation made by law. This being true, and pretermitting the question of the exercise of his judgment or discretion on the legality of the payment, is the duty to be performed by him in this case merely ministerial? Has the legislative appropriation been made? Has the executive warrant, countersigned by the comptroller general, been obtained by the relators? Nothing of the sort has been done, nor is it claimed that it has. If, therefore, this has not been done, before mandamus should issue, ought it not to appear that it is the duty of the treasurer to pay without an executive warrant, and without an existing legislative appropriation?

But it is claimed that such an appropriation was made, and besides, that by the constitution of 1877 provision was made for the payment of these bonds, which makes no further appropriation necessary.

The clause here referred to will be found in article VII, section XIII, paragraph I, which simply declares that the sale of the Western and Atlantic, Macon and Brunswick, or other railroads held by the state, or any other property owned by the state, whenever authorized to be sold, the proceeds from such sale shall be applied to the payment

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of the bonded debt, and used for no other purpose so long as she has any existing bonded debt. The bonds of the relators nor any other particular class of bonds is specified for payment by this clause in the constitution.

Relators further allege that the refusal to pay these bonds is justified by the treasurer, under the act of the general assembly of March 2d, 1875, and that the said act is unconstitutional.

Unconstitutional because it materially affects the remedy of the relators as to its enforcement; and, because the performance of a contract should not be left to the discretion of an officer designated after contract made; and, lastly, that to impose conditions after the contract is complete is to impair its obligations.

In considering these grounds of objection to the act of 1875, we admit that nothing can be more material to the obligation of a contract than the means of its enforcement, and that the idea of validity and remedy are inseperable, and are parts of the obligation which the constitution guarantees against impairment.

How this legal principle is applicable to these bonds does not appear. The same means of enforcement existing when they were issued, exist to-day. Their payment depended upon a legislative appropriation then, and depends upon a legislative appropriation now. So that the doctrine of enforcement and remedy has no status in this case. To invoke such doctrine, they should first show a remedy, or that the legislature had clothed the treasurer with power to pay, and then revoked it.

Upon the second ground of complaint, which is, that the performance of a contract should not be left to the discretion of an officer designated after contract made, we say, that there has been no change in the discretion of the officer designated to pay the public debt since the issuance of these bonds. The payment in all cases, and for all debts, has been hitherto made by provision of law, Gurnee, Jr., & Co. vs. Speer, treasurer.

and, after legislative appropriation, upon executive warrant. When payments are now made, they are made in the same way, but always under and by legal authority, which must exist before the treasurer can be called on to pay.

The third subject of relators' complaint is, that the act of 1875 imposes conditions upon the holders of these bonds, which impair the state's obligation to pay.

The relators most earnestly maintain that the act of 1875, being obnoxious to all these objections, is unconstitutional and, therefore, void. An examination of the act itself, shows by its caption that it was an act to protect the people of Georgia against a repayment of past due bonds.

These bonds matured in 1870-71, and the legislature of 1875, believing that many of the bonds which matured prior to 1872, had been paid, and fraudulently re-issued. enacted this law to secure the state against a second payment. Its provisions required that all such bonds should be registered within five months from the passage of the act, and upon the failure to do so they were to be deemed prima facie to have been paid and illegally re-issued. Other provisions of continuous ownership were also required, to enable the general assembly to identify them. This registration and information were to be presented to the governor, who, when satisfied that they were properly chargeable to the state, was to direct the treasurer to pay them. Two months notice, by publication in two news. papers in the city of Atlanta, and two in the city of New York, was further provided. There was no repudiation of one dollar of the state's bonded indebtedness. provided the means of inquiring into the amount really due, and prescribed the manner in which the payment was to be made. It is to be observed that the state only wanted the assurance that these past due bonds were in the hands of bona fide holders, and had not been fraudulently put in circulation a second time.

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Besides, it will be noticed that the act, even if not complied with, does not declare that the bonds are never to be paid, but that they are to be considered prima facie fraudulent only to the extent of not allowing the treasurer to pay them, except by the direction of the governor. other words, the act reserves the genuineness of such bonds as are of doubtful validity to be passed upon by the governor before they are to be paid by the treasurer. But nowhere does it declare that unregistered bonds shall not be provided for by the legislature, or that they shall be barred or forfeited. Moreover, this act created no new obligation upon the governor, distinct and additional to such as was upon him when these bonds were issued. Hiswarrant could not then have been demanded, directing the treasurer to pay a bond of doubtful genuineness any more than now. To draw money from the treasury required then, as now, the joint act of the governor and treasurer, and without such joint act, except as before stated in this opinion, the treasurer can no more pay out money lawfully than the watchman. 56 Ga., 676.

There being no change, then, in the enforcement of this pre-existent contract dependent upon the discretion of the governor, from that supervision which he had over the contract when entered into, this case does not fall within the reason of the rule laid down in the cases cited by counsel for plaintiff in error. Nor has the legislature, in the act complained of, attempted to bar or forfeit the right of these bondholders to demand and receive payment for their bonds, and for that reason this act differs toto cælo from many of the authorities produced.

In concluding our opinion upon this case, we desire expressly to disclaim any intimation that these bonds have been paid, or that they are illegally in the hands of the relators. We simply rule that, on the facts made by the pleadings, the writ of *mandamus* does not lie against the treasurer.

Judgment affirmed.

### BONNER et al. vs. HOLLAND et al.

- While the evidence in this case is conflicting, yet we cannot say that the verdict is contrary to law, evidence, or the charge of the court.
- Beneficiaries of a trust cannot both hold and enjoy the proceeds of their trust property and at the same time recover the property itself from one who paid full value therefor. Equity will not aid them in such an effort.
- (a.) Beneficiaries of a trust, who claimed that certain land was a part of the trust estate, though held by their trustee in his own name, after sale of the property by him sought to pursue the fund arising therefrom, by bill in equity, into certain land bought by the trustee, which litigation resulted in a compromise, by which a part of the land was set aside to an individual creditor of the trustee, and the cestui que trusts were to take a decree against the trustee as to the balance of the land, which was of more value than the proceeds of the first lot:
- Held, that in a subsequent suit by them to recover the first lot, the presumption would be that they recovered in the suit for the proceeds according to the compromise, and the onus would be on them to show that such effort to recover the proceeds had proved fruitless.

New Trial. Verdict. Trusts. Before Judge ERWIN. Hall Superior Court. September Term, 1881.

Reported in the decision.

- D. M. DUBOSE, for plaintiffs in error.
- J. B. ESTES & SON; N. J. HAMMOND; CANDLER & THOMSON, for defendants.

SPEER, Justice.

Plaintiffs in error brought their bill in equity in Hall superior court to recover a tract of land containing six hundred acres, known as the "Limestone Spring tract" originally, now as "New Holland Springs," lying in Hall county.

There was, under the evidence and charge of the court, a verdict for the defendants, whereupon complainants made a motion for a new trial, which was overruled, and complainants excepted. The record discloses that the premises sought to be recovered belonged originally to Isaac Ramsey, late of Columbia county. That he died testate about the year 1860. That by the fourth item of his will one-fourth of his estate was given "to W. H. Bonner, for the use of his wife, Sarah E. Bonner, (a daughter of testator) during life, and at her death to her children, if any, if none, to W. H. Bonner absolutely." Under the will, the executors (of whom Bonner was one) were authorized "to sell any property not specifically bequeathed, at public or private sale without an order of court." That during the existence of the trust estate the trustee was empowered to sell any portion of the trust estate, re-investing proceeds on like trusts and limitations. That in the distribution of the testator's estate this "Limestone Spring tract" of land was, by a private sale at auction, among the executors, bid off for Mrs. Bonner, a deed made to John Bonner, individually, dated 12th of March, 1863, and recorded 25th of March, 1863. That on 25th of March, 1867. by deed duly recorded, John Bonner conveyed the land to W. H. Bonner, husband of complainant. It is alleged that though the deeds were thus made, yet the property was in fact intended to be, and was received as, part of the estate of Mrs. Bonner under the trusts in her father's will, and was her trust estate.

Further it appears, and is so alleged, that W. H. Bonner, on the fifth day of April, 1871, by deed duly recorded, sold and conveyed for the consideration of \$3,600.00 "the Limestone Spring place" to Thomas Alexander and Edward W. Holland, the bill charging and alleging that at the time of said sale and conveyance the purchaser, Holland, knew and was so informed that the property was the trust property of complainant, and the same was by him bought with full notice of the trust. That some time

thereafter Alexander sold his half interest in the premises to Edward W. Holland. The bill was brought by complainants to recover of Holland and Alexander the lands with the mesne profits and rents. W. H. Bonner was also a party defendant to the bill; discovery was waived as to Holland and Alexander, but was invoked from Bonner, the other defendant. On the trial, the evidence showed that the price paid by Holland and Alexander was the full market value of the property.

During the trial, the respondents offered and read in evidence a record of certain proceedings in Gordon superior court, by which it appeared that one Dennis Johnson had sold to W. H. Bonner a valuable tract of land in Gordon county, for which W. H. Bonner was to pay him \$12,500.00. That Bonner paid \$5,000.00 and accepted from Johnson a bond conditioned to make titles on payment of balance of the purchase money. That for said balance Johnson sued, and having received nearly one-half of the balance remaining unpaid from the proceeds of the sale of said "Limestone Spring place," judgment was rendered in favor of Johnson against Bonner for the balance still due, \$4,142.45. That a fi. fa. issued on said iudgment and was transferred to J. M. Harlan and others, and was levied on the lands in Gordon county, when the complainants in this case filed a bill in Gordon superior court against W. H. Bonner, J. M. Harlan, and others, charging that all the payments made by said Bonner on said Gordon county property were made in the trust funds of complainants, and specifically alleging that the proceeds of the sale of the "Limestone Spring tract" were paid to Johnson on account of the purchase of the Gordon county lands. The bill further charged fraud and knowledge on the part of defendants that the trust funds were used by Bonner in said purchase, etc. The prayer was for an injunction, etc. Afterwards a decree was rendered on said Gordon county bill by which the defendants controlling the fi. fa. of Johnson vs. Bonner were

allowed to take a portion of the Gordon county lands in settlement of their fi. fa., and the bill was dismissed as to them, but retained as to Bonner, with the right on the part of the complainants to take a decree against Bonner for the remainder of said tract in favor of complainants, which was shown to be worth \$8,000.00, and the same is now in possession of the complainants.

The grounds of the motion for new trial were:

- (1.) That the verdict was contrary to evidence and without evidence to support it.
- (2.) The verdict was strongly and decidedly against the weight of evidence.
- (3.) That the verdict was contrary to the charge of the court in this: The court charged, "If the jury believed from the testimony that at the time E. W. Holland purchased the land from W. H. Bonner, he (Holland) had notice of the fact that the land was trust property and the property of complainants, and that he paid Dennis Johnson upon the individual debts of W. H. Bonner, then it is your duty to find for the complainants the amount of money so paid to Johnson on these debts, with interest from that time."
- (4.) That the court erred in charging the jury, "If the jury believe from the evidence that the complainants in this case brought a bill in Gordon superior court against W. H. Bonner and others, in which they alleged that the proceeds of the sale of the New Holland property, the purchase money paid by Holland, has gone into certain lands in Gordon county, described in said bill, and prayed that said lands should be decreed to be trust property for the use of complainants, and if the jury further believe that there was an agreement between the parties, complainants and defendants to the bill in Gordon county, by which it was provided that a certain portion of said land, to be determined by arbitrators, should be taken by the creditors of W. H. Bonner, who were the defendants to the bill, in satisfaction of their debts, and that the bill

should be dismissed as to them, but should stand as to W. H. Bonner, and the complainants should be authorized to take a decree vesting the title of the remainder of said land in Mrs. S. E. Bonner and her children, on the trusts and uses arising under the will of her father. Isaac Ramsey, and if the jury further believe that said arbitrators made an award describing the property and defining its metes and bounds, that should be taken by the creditors of W. H. Bonner, and if the award was made the judgment of the superior court of Gordon county, and the bill dismissed as to all the defendants except W. H. Bonner, and left standing as to him, then I charge you that the presumption is that the complainants in this case have taken the decree against W. H. Bonner, above mentioned, or can do so when they desire. That is a matter with which the defendants in this case have nothing to do, and one over which they can exercise no control. If any thing has intervened to prevent complainants from taking said decree, or if for any reason the pursuit of the proceeds of the sale of the New Holland property by complainants have proved fruitless or unavailing, it is incumbent on the complainants to show that fact, and if they have not done so, that they cannot recover in this case."

The two grounds mainly relied on in this court by counsel for plaintiffs in error were those as set forth in the third and fourth grounds of the motion just recited.

I. Was the verdict contrary to the charge of the court as complained of in the third ground? for this also involves the first and second grounds as being contrary to evidence and the weight of evidence. That there was a conflict in the evidence on the vital question involved, whether Holland had any notice at the time of his purchase of the "Limestone Spring Place" (now known as "New Holland") that the property was trust property, and belonged to complainants, is unquestionably true. It is true Bonner and Hicks both testify that Holland was notified of this fact and was so informed: but on the con-

trary Holland as positively denies the fact and testifies most unequivocally that he had no such notice, nor the faintest suspicion of the fact that the property was a trust and belonged to complainants, and his testimony is supported, negatively it is true, by Dennis Johnson and J. M. Harlan, who were present and heard nothing of any trust at the time, though Bonner and Hicks both say that the notice of the trust was given at that time. Here, then, are the two witnesses in favor of the fact of notice, while three others, though present, heard nothing of it. must also be remembered that Bonner's credit as a witness is assailed by witnesses for want of truth, though supported by others who seek to sustain him. When in this conflict of evidence the deeds made for the property and duly put upon record for years past negative any such trust, and the management, control, and taxes paid, all point to it as the property of W. H. Bonner, the husband, we are by no means satisfied that the verdict is against the evidence on this point, or contrary to the charge of the court as complained of in the third ground of the motion: and when in addition to this the fact is patent that Holland and Alexander paid full value, and more, according to some of the witnesses, than the property was worth, it would be strange and unnatural to believe they were doing so with a knowledge that they were buying a defective title, from one who avowed at the time, according to his testimony, "that he could not make a good title." Such conduct is not only unnatural, but bears the stamp of improbability so patent upon its face that we are not surprised that the jury should have discredited it.

With one who is a bona fide purchaser for value and without notice of an equity, a court of chancery will not interfere. But in this conflict of testimony on the subject of notice, the jury were selected to weigh and pass upon it, and we find ample reasons in this record for sustaining their verdict.

2. Neither do we find any error in the charge of the court on the subject of the evidence contained in the record from Gordon county, as complained of in the fourth ground of the motion for new trial. If these complainants, under their sworn bill filed in Gordon county, alleged that the proceeds of the sale of the New Holland place had been invested by payment in part for the Gordon county lands, and it is shown that by an agreement had under that bill with the creditors of W. H. Bonner, and with his approval, they have secured lands there worth \$8,000.00 as their trust estate, or can so secure them at their pleasure, then we think, when thus they have elected to pursue these funds thus invested, and are now enjoying their fruits in Gordon county, paid for in part with the proceeds of the sale of the New Holland tract, they come with ill grace into a court of equity and seek the second time to recover the land or the money paid for the same by the defendants, and we find no error in the court instructing the jury that, under such circumstances, the complainants would not be entitled to recover. Code, §§3085, 3086, 3087.

The evidence shows the defendants paid full value for these lands now sued for; under the evidence the jury could well find they were bona fide purchasers for full value and without notice. From the proceeds of the sale thus made, the evidence shows the complainants are enjoying its full benefit by the use and possession of the valuable lands in Gordon county, and we see nothing in this record that would, in our opinion, justify us in interfering with a verdict so well sustained by the evidence as well as the law and equity of the case.

Judgment affirmed.

Rutherford, administrator, vs. Rountree et al.

### RUTHERFORD, administrator, vs. ROUNTREE et al.

- Where a distress warrant had been levied, a counter affidavit filed and a bond given for the eventual condemnation money, the process became mesne, and the debt could be discharged by bankruptcy, though the adjudication was after the levy of the distress warrant.
- (a.) The discharge of the principal in the replevy bond would operate to discharge his securities.
- 2. Bankruptcy of a defendant stays all pending suits against him, on proper application therefor, until the determination of the bankruptcy; but when the amount of the debt is in dispute, leave may be granted by the bankrupt court to prosecute the case to judgment, in order to determine the amount which may be proved in bankruptcy, but execution shall be stayed.
- (a.) After the discharge the stay of proceedings ceases, and, therefore, the leave to proceed becomes of no turther avail. Hence, on a trial after discharge, the question being whether plaintiff's debt was so discharged or not, orders of the district court granted pending the bankruptcy, allowing plaintiff to proceed for the purpose of ascertaining the amount of his claim, were irrelevant and not admissible in evidence.

Bankruptcy. Principal and Surety. Evidence. Before Judge MERSHON. Houston Superior Court. October Term, 1881.

Reported in the decision.

DUNCAN & MILLER; RUTHERFORD & GUSTIN, for plaintiff in error.

DAVIS & RILEY; HALL & SON, for defendants.

SPEER, Justice.

On the 23d September, 1873, the plaintiff in error sued out a distress warrant against the defendant, claiming the sum of eight hundred and ninety-seven dollars, as principal, besides interest, for rent. The warrant was levied upon certain property of the defendant, whereupon he

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tendered his affidavit, under the statute, denying the amount distrained for was due, and replevied the property levied on by entering into a bond, with one W. Bronson as security, "conditioned well and truly to pay the eventual condemnation money in said case." The papers were returned to the superior court of said county, and on the trial thereof, the defendant, in bar of said suit, filed and pleaded his certificate of discharge in bankruptcy, the same being a discharge against all debts and claims which, by the bankrupt act, were made provable against his estate, and which existed on the 12th day of January, 1874. The certificate of discharge in support of said plea was admitted in evidence without objection, and defendant closed.

Counsel for plaintiff below offered in evidence, in reply to the certificate of discharge, two orders, or applications, granted by the bankrupt, or district, court for the Southern district of Georgia, dated respectively the 26th of November, 1875, and 20th November, 1877, giving plaintiff leave to proceed to judgment in the suit pending against the defendant, the same being admitted to have been granted pending the bankruptcy of defendant, and prior to his final discharge. The said orders thus offered were objected to and excluded by the court as evidence.

The plaintiff below having closed, the court instructed the jury, "that if they were satisfied that the defendant, Rountree, had been duly adjudicated a bankrupt on the 12th of January, 1874, and subsequently received a discharge from the bankrupt court, which was fair and bona fide, they would find the issue in his favor, and the defendant was discharged from all liability on account of this debt," whereupon the jury rendered a verdict in favor of defendant, on his plea of discharge in bankruptcy. To which rulings and charge of the court plaintiff excepted, and assigns the same as error.

We see no error in the ruling of the court excluding the orders or leave granted by the district court for the Rutherford, administrator, vs. Rountree et al.

Southern district of Georgia, allowing plaintiff to proceed with said cause to judgment, on the ground that they were irrelevant. We regard the effect of the plea of bankruptcy, if made and sustained by proof, as settled in this cause when the same was before this court at the September term, 1880. Rountree vs. Rutherford, 65 Ga., 444.

In that case the court held that the counter-affidavit filed by the defendant below might be amended by setting up a discharge in bankruptcy, and "that a certificate of discharge in bankruptcy would discharge the principal, Rountree, and the discharge of the principal would operate as a discharge of the security on the replevy bond for the eventual condemnation money." But it is insisted by counsel for plaintiff in error that the introduction in evidence, if allowed, of the orders or leave to proceed to judgment, granted by the district court, would authorize him still to proceed to judgment against the bankrupt, notwithstanding his plea and proof by the certificate of his final discharge.

Bankruptcy of a defendant stays all pending suits on application of the defendant, until the determination of the discharge, but when the amount of the debt is in dispute, leave is granted by the court to prosecute to judgment for the purpose of ascertaining the amount which may be proved in bankruptcy, but execution shall be stayed. U. S. S., §5106. The right of stay is a personal privilege of defendant. If he fails to ask for the stay and plaintiff takes judgment, it is a good judgment against the bankrupt. 61 Ga., 58, 500; 57 Me., 26.

The object of this section is to protect the bankrupt from being harrassed with suits while he is proceeding in good faith to obtain his discharge, and until the discharge is determined. 2 B. R., 236; 1 B. R., 201; 2 Ben. U. S. D. C., 78; 3 Ben. U. S. D. C., 14.

So soon as the question of discharge is determined, the stay is at an end. It ceases, as the bankrupt may then plead his discharge as a bar to the debt. No order to

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show the termination is required. In re Thomas, 3 B. R., 38, and cases last cited.

The object of the order for leave to proceed being alone for the purpose of ascertaining the amount due, when it is in dispute, the bankrupt court allows the order for this purpose alone. This being the sole object of the order, when the stay ceased, the order lost its efficacy and became irrelevant. The plaintiff then could proceed without any order to determine either the amount due on his debt. or if he desired, whether the discharge was a bar to the debt. Here the defendant did not longer invoke the stay or dispute the amount of plaintiff's debt. He offered no evidence, but simply his evidence of discharge from that debt. That was the issue, and sole issue, tendered, and the orders offered were irrelevant to such an issue. A bankrupt court never enters into the inquiry whether a discharge will operate to the discharge of a particular debt. The inquiry can only be made in a court where a direct suit on the debt is pending, and whose judgment will be binding on the parties. 2 B. R., 236; Ib., 485; I Ib., 29; 14 Ib., 18. This being true, the orders were irrelevant, and properly excluded.

Let the judgment below be affirmed.

### HAMMOND vs. BUCHANAN.

- Where an application to remove a case to the circuit court of the United States was made under the act of congress of March 2d, 1867, on the ground of local prejudice, it could be made at any time before the trial or final hearing in the state court.
- (a.) The act of 1867 was not repealed by the act of 1875.
- 2. In order to be entitled to remove a case to the United States court on the ground of local prejudice, under the act of congress of 1867, it is not essential that the applicant should have been a non-resident of the state at the date of the commencement of the suit.

Laws. Removal of Causes. Before Judge HARRIS. Coweta Superior Court. September Term, 1881.

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Reported in the decision.

D. F. HAMMOND, in propria persona; W. R. HAM-MOND, for plaintiff in error.

HUGH BUCHANAN; BREWSTER & DAVIS, for defendant.

JACKSON, Chief Justice.

This was an application to remove a case pending in the superior court of Cowetz county. On demurrer to the application, it was dismissed, and that judgment is assigned as error.

The application is made on the ground that the defendant cannot obtain justice in the state court, and the proper affidavit to that effect is made and appears of record in the case.

The demurrer appears to be special, and rests on two grounds: First, that the suit was brought in 1858, and the first trial term thereof in the state court has long passed, and therefore the application comes too late; and secondly, that the application does not state that applicant was a citizen of Florida at the time the suit was brought.

1. The application is brought by virtue of the act of March 2d, 1867, which is embodied in the third subdivision of section 633 of the revised statutes of the United States. Abbott's U. S. Prac., page 27. In that subdivision it is enacted that the application may be "filed at any time before the trial or final hearing of the cause." Is this enactment repealed by the act of 1875? It is not expressly repealed, nor, we think, by necessary implication. Authorities differ on the subject. That it is not repealed see 3 Woods, C. C. R., 683, and cases there cited. Until adjudicated and decided by the supreme court of the United States, this court will adhere to its own ruling on the point that the application in such a case may be made at any time before trial. Cox et al. vs. The East Tennessee,

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Virginia and Georgia Railroad Company, 62 Ga., 163. That application was made after the act of 1875, and whilst I do not remember that this question of repeal was made and decided on argument, yet the effect of that decision is to hold this provision in the act of 1867 not to be affected by the act of March, 1875. The case and opinion are not fully reported in 62 Ga., 163, but a mere syllabus is made of the the point decided. See also Stone vs. Sargeant, Sup. Ct., Mass., South. Law Rev., Vol. 7, No. 5, p. 761, Sept. 26, 1881; and Sup. Ct. of Ga., Jones vs. Foreman, 66 Ga., 371, which fully covers this point.

2. Must the applicant have been a citizen of another state when the suit was brought, under the act of 1867? Clearly not, we think, in the case at bar. It was pending when that act was passed; and the act itself provides that "where a suit is now pending, or may hereafter be brought in any state court in which there is a controversy between a citizen of the state in which the suit is brought, and a citizen of another state, such citizen of another state, whether he be plaintiff or defendant, if he shall make and file an affidavit in such state court that he has reason to believe, and does believe, that from prejudice or local influence, he will not be able to obtain justice in such state court, may have the cause removed to the circuit court of the United States."

In 60 Ga., 423, under a very similar statute, so far as the pendency of the suit and the matter of controversy is concerned, we intimated very strongly that the applicant need not have been a citizen of another state at the commencement of the suit. And though in that case the applicant was a foreign corporation, or a New York corporation rather, and the facts, therefore, do not precisely make the case before us, yet had it not been such a corporation the ruling most probably would have been the same.

The words in the act of 1875, as cited in the 60th Ga.,

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are, "that any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, \* \* \* in which there shall be a controversy between citizens of different states, \* \* \* either party may remove," etc. By reference to the citation from the act of 1867 supra, it will be seen that the words are substantially the same, "now pending or hereafter brought," and the controversy is to be "between citizens of different states" in the act of 1875, and in this of 1867 "between a citizen of the state in which the suit is brought and a citizen of another state," which in substance is the same thing in both acts. only difference between the two acts is that in one the words "there shall be a controversy" are used, and in the other the words "there is a controversy," but the verb "shall be," as well as the present tense of the same verb "is" refers to controversy and not to citizenship. They mean the same thing, because "is" applies in the act of 1867 to suits hereafter brought, as well as to pending suits, and when applied to the former it must be equivalent to "shall be."

In view, therefore, of our own ruling in the 60th Ga., and of the opinion of Mr. Justice Miller, in I Wooley, 390, and the cases in 3 Dillon, 350; 3 Wood, 715, and that in So. Law Review, Vol. 7, No. 1, p. 173, we shall hold that, under the act of 1867, the applicant need not have been a citizen when the suit began. Indeed, this case is stronger in the facts than any cited. It was pending when the act was passed, and is included in its letter. The words "now pending" embrace this case, and exclude the idea of citizenship at the commencement of the suit. Suppose that at the time the act was passed, Hammond had been a citizen of Florida, would any body doubt his right to remove the case? What difference can it make that he now is a citizen of that state, and that the controversy is between him and a citizen of Georgia? If he need not

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have been a citizen at the beginning of the suit, and need not make application until the final trial, where shall we stop his right to move *bona fide* to another state and carry with it the rights, all the rights, of citizenship therein?

We conclude, therefore, that the application was in time, and the allegation of citizenship at the time of the application is sufficient, and that the demurrer should not have been sustained on the points made therein.

If, on other grounds, the application was insufficient and could have been amended, the application should not have been dismissed, but amendments allowed. Under our own law, all pleadings in form or substance are amendable, and the right of amendment in these removal cases is recognized in the United States courts. 10 Otto, 471; 11 Ib., 263.

We do not say that, reading the record with the application or petition, that it is defective. We hardly think it is; but if so, as no point is made on it in the demurrer, which is special, the case ought not to have been dismissed if the facts authorized amendment.

On the whole, we think that the applicant was entitled to remove his case, and that the court erred in dismissing the petition on the facts made in this record by the special demurrer to the petition, and the judgment is reversed.

Judgment reversed.

# ROWAN, guardian, vs. MCCURRY et al.

- 1. A charge in a bill filed by the beneficiaries of a homestead estate to recover the same from a purchaser thereof, that the sale was induced by the fraudulent conduct of said purchaser, which was not discovered until within less than six months before the filing of the bill, will not relieve the case from the operation of the act of February 15, 1876, imposing a limitation upon suits brought to recover homesteads sold before the passage of that act.
- (a.) No exception was made in that act as to the manner in which the homestead was conveyed, whether in good or bad faith; whenever

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conveyed at all, it was the purpose of the act to provide for the most ample and speedy restoration of the respective rights of the parties as nearly as practicable.

Homestead. Statute of Limitations. Fraud. Before Judge HARRIS. Campbell Superior Court. August Term, 1881.

Reported in the decision.

P. F. SMITII; R. T. DORSEY; A. C. KING, for plaintiff in error.

THOS. W. LATHAM; L. E. BLECKLEY, for defendants.

CRAWFORD, Justice.

This bill was filed by Matilda Rowan, as guardian of the minor children of Joseph Brantley, to recover a homestead which the said Joseph sold and conveyed, in 1874, to the defendant, W. A. McCurry.

The ground upon which the complainant rests the right to recover the homestead property is, that the said Joseph Brantley was fraudulently induced by the corrupt conduct of the defendant to sell and convey to him the said homestead property, when it was well known to the said defendant that the said property had been set apart as a homestead for the benefit of the said minor children. The bill was filed, and made returnable to the August term, 1878, of the superior court of Campbell county.

To this bill a demurrer was filed upon several grounds, one of which was that the suit was barred by the statute of February 15th, 1876, and upon this the demurrer was sustained and the bill dismissed.

Whilst there are other questions made by the record, this must control the case, and we proceed to rule it. In the case of *Pittman*, next friend, etc., vs. Matthews, 66 Ga., 600, this court held, that the limitation provided by the act of 1876, for bringing suits to recover

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homesteads, made no exception in favor of minors and married women, so as to allow them six months after the removal of their disabilities, and within which their right of action should not be barred.

It is sought by this bill to remove the bar of the statute upon the ground of fraud in the defendant, and it is insisted that the suit having been brought within six months of its discovery the same should be maintained.

We recognize the general principle here insisted upon to its fullest extent, but it is to be remembered that these homestead rights are allowed under a policy of the state, and are to be enjoyed and governed alone by that poli-Many of them, prior to the act of 1876, had been illegally sold, as ruled by this court, and the object of that act was to provide for a speedy adjustment of the rights of all parties under such illegal sales. It was immaterial for what reason the sales were illegal in so far as the rights of the parties were concerned. No exception was made as to the manner in which the homestead was conveyed-whether in good or bad faith; wherever conveyed at all, it was the purpose of the act to provide for the most ample and speedy restoration of the respective rights of the parties as nearly as practicable. But the legislature, in its wisdom, declared that all the proceedings for the recovery of such property under that act should be confined to courts of equity, and should be brought within six months after the passage of the act, or the right of the party complainant, and all right of suit for its enforcement, should be forever barred.

This suit is brought under the act and after the lapse of six months. The evident policy of the state was to have all conflicting rights arising out of the sales of these homesteads settled at once, hence there was no saving clause in favor of anybody, nor for any reason.

The right upon which this complainant rests her equity under this act, if it exists to-day, would equally exist fifteen or twenty years hence, or even longer, if the fraud Bailey vs. Ross, administrator, et al.

should not be discovered until that time, and the parties were still entitled as beneficiaries.

We are clearly and decidedly of the opinion that the demurrer was well taken and properly sustained.

Judgment affirmed.

### BAILEY vs. Ross, administrator, et al.

Where, after due notice, leave has been regularly granted by the court of ordinary to an administrator to sell realty of a decedent, equity will not restrain the sale by injunction at the instance of an heir on account of reasons which could have been as readily urged on a caveat to the application for leave to sell.

(a.) A judgment of a court of ordinary granting leave to an administrator to sell the realty of a decedent, is a judgment of a court of competent jurisdiction. It cannot be collaterally attacked except for fraud; nor can it be vacated even in the same court except upon notice and for good cause shown.

(b.) Mere apprehension of danger or injury, unless founded upon reason, will not require equitable relief.

Administrators and Executors. Ordinary. Judgment. Before Judge SIMMONS. Bibb Superior Court. October Term, 1881.

Reported in the decision.

LYON & GRESHAM; W. DESSAU, for plaintiff in error.

HILL & HARRIS; WHITTLE & WHITTLE; BILLUPS & HARDEMAN; HALL & SON, for defendants.

SPEER, Justice.

Albert B. Ross, administrator, defendant in error, applied to the court of ordinary for leave to sell the lands of James B. Bailey, his intestate, and having procured the necessary leave, proceeded to advertise the same for sale; whereupon plaintiff in error filed his bill to enjoin

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said administrator from selling said land, for the reasons that:

- (1.) There are no debts of the estate of James B. Bailey, and no reason why said lands should not be divided in kind, and especially as he was desirous of having his part apportioned to him in land, and not the proceeds thereof.
- (2.) Because the existence of a cross bill, filed by John T. and Edgar C. Bailey against the plaintiff in error and others, in which the title to said lands was in controversy, formed a cloud upon the title to said lands, and would prevent their bringing an adequate price, if sold before said cloud could be removed by the ending of said litigation.
- (3.) Because the clerk of the superior court being the administrator on said estate, the proceeds of said sale would not be protected by any bond pending the litigation under this and the previous bill, and the land, if not sold, would be more productive and a safer investment than any that could be made by said administrator to await the decisions in said cases.

The answer set up in substance that the complainant was concluded by the judge of the court of ordinary as to the sale of said lands, and that the clerk of the superior court, who is the administrator, is solvent, and the proceeds of the sale would be safe in his hands.

Upon the hearing of the case upon the bill and answer and exhibits attached, the court below refused the injunction; whereupon the complainant excepted.

We see no abuse of discretion in the chancellor below in refusing this application for an injunction. All the matters now set up and assigned as a reason why the sale of these lands should be enjoined, existed and were well known to the complainant before the granting of the leave to sell by the ordinary. The record shows that the application for leave to sell was regularly made, and the notice thereof given to all parties interested by the publication provided by law. There is no pretence on the

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part of the complainant that any unusual course was taken by the administrator in making this application to procure this order of sale, and if he had any cause of objection such as he now sets forth in his bill, no excuse is given why the same was not offered by way of objection before the proper court that had full jurisdiction to hear and adjudicate the questions he now makes. The answer of the administrator alleges his solvency and leaves no doubt that the proceeds of the sale will be safe in his This judgment of the court of ordinary authorizing this sale is a judgment rendered by a court that had full jurisdiction of the subject matter, and cannot be rescinded, vacated or revoked even by that court, only on notice to the administrator and for good cause shown. 33 Ga., 238; Johnson vs. Holliday, decided at September term, 1881; 49 Ga., 553; 54 Ib., 496; 58 Ib., 284.

In the case of Johnson vs. Holliday, decided at the September term, 1881, this court held "where an administrator has been appointed, and after due notice an order to sell has been granted, injunction will not issue to stop the sale at the instance of heirs on the ground that they prefer a division in kind, and that the only debt claimed against the estate (except a small account which they propose to pay) is not legal, there being no allegation of insolvency, fraud or collusion."

Neither can such a judgmeut be collaterally attacked except for fraud. Code, §3593; 47 Ga., 195.

In view of the whole case, we do not think, taking the case as made by the record, there is any sufficient reason shown for the interposition of a court of equity. The complainant had an ample remedy at law at the proper time and before the proper court to secure (if he was entitled to it) a partition of the lands instead of a sale, and to protect himself against all the apprehensions of loss that now seem to haunt him. Having failed to then appear, we cannot think he is entitled to that relief in a court of chancery from these mere apprehended wrongs

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which he neglected to provide against in a court of law by his own laches. Moreover, it is judicially known to this court as to the bill filed in which it is alleged that a cloud is created upon the lands of the intestate as one reason for this injunction, that a decision of this court in this case at this term disposes of that bill and relieves the title of the property from any such embarrassment.

Let the judgment below be affirmed.

# BECK vs. BOWER et al., administrators.

- 1. One entry of "no personalty" by a constable on a justice court f. fa. is sufficient to authorize a levy on real estate; such entry need not be repeated at intervals to render a levy on realty valid.
- (a.) An entry of "no property to be found" was made by a constable on a justice court fi. fa.; seven days thereafter a horse was pointed out by the owner of the fi. fa.; it was levied on, sold, and the proceeds applied to older executions. Without further entry, a levy was made on realty:
- Held, that the levy was not void, and a sheriff's sale thereunder conveyed the title of the defendant in fi. fa.
- 2. A sheriff's deed alone is not sufficient to show title in the purchaser; it must appear that the title was in the defendant, or that he was in possession after the date of the judgment on which the sheriff's deed was based.

Levy and Sale. Executions. Title. Before Judge WARREN. Mitchell Superior Court. November Term, 1881.

Reported in the decision.

R. N. ELY; D. H. POPE, for plaintiff in error.

W. E. SMITH; BUSH & LYON, for defendants.

CRAWFORD, Justice.

This was a suit in ejectment. On the trial, a fi. fa. from a justice's court was offered in evidence to support a sher

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iff's deed; the entries thereon, among other things, showed "no property to be found subject;" seven days thereafter, that a horse had been pointed out, levied upon, sold, and the money paid to older executions; that the levy upon the land was made without any further entry of no personal property. Objection was made to the introduction of the fi. fa. upon that ground; the court ruled it in, and that makes the first assignment of error in this case.

1. It was held in 27th Ga., 341, that one entry of no personal property was sufficient to authorize the levy upon land by a constable; but it is insisted that a subsequent levy upon such property destroys the legal right of the constable to levy upon land.

If the construction placed by Chief Justice Lumpkin, in the case of Hollingsworth vs. Dickey, 24 Ga., 434, be correct, in relation to the act requiring a return of no property to be made upon such fi. fas., and one is made, that would appear to be sufficient notwithstanding the subsequent levy. He says that "the act itself was passed for the benefit alone of the defendant in fi. fa., to give him the right to compel the satisfaction of his debts out of his personal property, leaving him in the enjoyment of his homestead. Still, allowing him the right of pointing out his land, if such was his choice. If he saw fit to stand by and see his land sold, the title of a bona fide purchaser should never be disturbed."

Looking at the facts in this case, we think the fi. fa. was admissible; first, because there was an entry of no property subject, made by the proper officer; second, because the personal property seized was pointed out by the owner of the fi. fa. only seven days after the entry of no property, thereby showing no fraudulent purpose by such entry to levy upon land; third, because it was unproductive; and fourth, because it was levied upon the land sold only three months from that time. It certainly never was contemplated that a new entry of no personal prop-

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erty should be endorsed upon a justice's court fi. fa. every three or four months, if so much time should elapse between such entry of no property and the levy upon land.

2. The only further assignment of error arises upon the charge of the court, wherein he held the sheriff's deed to be good without requiring the plaintiff to show title in the defendant in fs. fa., or possession after the judgment. This must be done. Parker vs. Burgess, decided at the present term, not yet reported.

Judgment reversed.

## ATTAWAY vs. MAYOR AND ALDERMEN OF CARTERS-VILLE.

A municipal corporation is not liable for a tortious arrest and imprisonment made by its police officers. 54 Ga., 468; 62 Ib., 290; 65 Ib., 387.

Case. Damages. Municipal Corporations. Before Judge FAIN. Bartow Superior Court. July Term, 1881.

Reported in the decision.

M. R. STANSELL; GRAHAM & FOUTE, for plaintiff in error.

TRIPFE & NEAL, for defendants.

CRAWFORD, Justice.

C. L. Attaway having been arrested and imprisoned by the marshal and a policeman of the city of Cartersville, brought suit against the mayor and aldermen to recover damages therefor.

He alleged that the said marshal and policeman, on or about the eighth day of August, 1879, while holding and exercising their offices, in executing the commands of the

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said mayor and aldermen did arrest and imprison him for the space of ten days in the calaboose of the said city without lawful warrant, and without the authority of law; that the said imprisonment was wanton, inhuman and brutal, because of the size, ventiliation and filthy condition of the said calaboose into which he had been cast. He further alleged that by reason of the said unlawful imprisonment he became sick, and was unable to work for several weeks thereafter, thereby bringing his family, which was dependent upon his labor for support, to want.

To this declaration counsel demurred, on the ground that no cause of action was set forth therein against the defendant. The demurrer being sustained, plaintiff offered certain amendments, which the judge refused to allow, and the case was dismissed.

There being no exception to the refusal of the judge to allow the amendments, the only question for our decision is, whether the demurrer was properly sustained.

1. That the city is not liable for the illegal acts of police officers, was held by this court in the cases of Cook vs. The Mayor and Council of the city of Macon, 54 Ga., 568; Harris vs. The City of Atlanta, 62 Ib., 290; McElroy vs. The City Council of Albany, 65 Ib., 387.

Judgment affirmed.

### STEADHAM et al. vs. SIMS.

- 1. Receipts in full and final settlement, given to a guardian by his ward after becoming of age, and acquiesced in for more than four years, are prima facie binding upon the ward. If she desires to show fraud or other lawful reason in avoidance of them, the onus is on her to do so.
- 2. If a guardian settle with his ward out of court, it is his duty to inform her concerning the condition of her estate, that she may act with full knowledge, but it is not incumbent on him in all cases to make a precise and detailed statement of receipts and expenditures, debts with interest on them, etc.

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Equity. Guardian and Ward. Fraud. Before Judge UNDERWOOD. Polk Superior Court. August Adjourned Term, 1881.

Reported in the decision.

DABNEY & FOUCHE; BLANCE & HERBERT, for plaintiffs in error.

IVY F. THOMPSON; E. N. BROYLES, for defendant.

CRAWFORD, Justice.

Martha A. Sims filed her bill against Simeon Steadham for an account and settlement of her estate in his hands as her trustee and guardian.

The defence relied upon was a compromise and full discharge of all liability upon the payment of the amount agreed upon between the parties.

Upon the trial of the case, the defendant, in connection with other testimony, offered two receipts; the first for \$500.00, bearing date October 20th, 1870, which recited to be in full of all moneys due to Martha A. Sims from her grand-father's estate; the second bearing date December 4th, 1873, for \$230, in full of all liability against Simeon Steadham, as one of the executors of Martin Steadham, deceased, as well as in full and complete satisfaction for all claims against the said Simeon, as trustee of the said Martha, in any shape, manner, or form, whatsoever.

The complainant sought to set aside the settlement of her estate, as shown in the foregoing receipts, upon the ground that they had been fraudulently obtained by withholding from her the true condition of the amount of money due her by the said trustee and guardian. Whilst, on the other hand, it was insisted that she was informed as to all the material facts in reference to the same.

The jury, under the charge of the court, found for the complainant, and the defendant moved for a new trial

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upon the grounds set out in his motion, three of which only are material here:

- (I.) Because the judge charged the jury that, "four years of acquiescence, by the ward, after a full knowledge of all her legal rights, will bar the re-opening of the settlement made with her guardian. But on such occasions the burden of proof is on the guardian to show full knowledge and acquiescence on the part of the ward."
- 1. We cannot concur in this view of the law with our learned brother who so ruled, because the receipts here given, being in full settlement and signed by the ward, are certainly bindging upon her, unless she can show some good and lawful reason to the contrary.

She files her bill, and charges that he is in debt to her as her trustee; he denies it; the testimony comes; she shows by his returns that he received it, and rests; this puts the burden on him; he shows her receipts in full and complete satisfaction, given more than four years before, and closes; without rebuttal, the case is with the defendant. But to destroy the legal effect of her receipts, which must be a bar to her recovery until overcome, she surrejoins that they were procured by fraudulent representations made by him as to the amount of her estate. Of course, then, the burden rests upon her to make the proof.

- (2.) Another error alleged is that the judge charged the jury, "If the guardian choose to settle out of court without citation, it is his duty to inform the ward fully and precisely of the whole state of her affairs, mentioning all money received for her, the amount due, with interest," etc.
- 2. The duty put upon the guardian by this charge is somewhat stricter than the law requires. The whole object of the law in such cases is to see to it, that neither imposition nor fraud is practised by the guardian upon the ward.
- "The intent and spirit of the statute is, that the ward shall know all about the case, and act knowingly. We are not disposed to hold it to its letter, that there must be in every case an actual exhibit of accounts." Such is

the language of the present Chief Justice construing §1847 of the Code; 59th Ga., 797.

In this case, it was not pretended by the defendant, at the trial, that the ward had received the full amount of principal and interest that would have been due her upon a strict legal settlement, but the issue was, did she, in view of all the facts connected with the management of her estate, and with a full knowledge of its condition and amount, agree to settle on the payment of the sums named in the receipts, without mistake on her part, or imposition or fraud on the part of her guardian. To have held this trustee, then, up to more than the letter of the law, and required him to have shown his ward precisely the whole state of her affairs, mentioning all the money received for her, the amount due, with interest, etc., was too exacting upon him, and especially upon an estate that had been brought down through the recent war. A new trial should have been granted.

Judgment reversed.

## THE GEORGIA RAILROAD COMPANY vs. THOMAS.

- I. Where a declaration alleged that the employés of a railroad had violently, unnecessarily and improperly blown the whistle of the engine, thereby frightening the plaintiff's horse and causing him to run away and injure the plaintiff, it could be amended by setting out more fully and distinctly the circumstances and facts of the tort. Such an amendment did not add a new cause of action.
- 2. Where answers to cross interrogatories refer to the answers of the same witness to direct interrogatories as containing the facts asked about in the cross interrogatories, and such facts are so contained, the interrogatories will not be excluded for failure to more fully answer the cross questions.
- 3. In suits against a railroad for damage to personal property caused by the running of its trains, after the injury has been established three defences are open to the railroad—that the plaintiff consented to the injury, that he caused it solely by his own negligence, or that the defendant exercised all ordinary and reasonable care and diligence. In cases of injury to the person, another defence is open

to the road—that the plaintiff could have avoided the injury by the use of ordinary care. Such defence should not be ignored by the court.

(a.) While ordinarily the general charge may be invoked to cure a defect in a special branch of it, yet where, after the conclusion of the general charge, a request of plaintiff's counsel was given, limiting the defence to proof of one of three propositions, and a request of defendant's counsel, allowing a fourth ground of defence (which was in fact admissible) was refused, such ruling will cause a new trial.

Amendment. Evidence. Interrogatories. Railroads. Damages. Negligence. Before Judge POTTLE. Hancock Superior Court. April Term, 1881.

To the report contained in the decision it is necessary to add only the following:

The second amendment of the declaration was, in brief, as follows: The engineer, as the agent of the defendant, instead of blowing the whistle only in approaching the crossing of the public road, as required by law, did blow it violently, etc., beyond said crossing, and continued to blow it for the distance of ninety or one hundred yards, thereby frightening plaintiff's horse, and causing him to throw the plaintiff, inflicting serious and permanent injuries on him.

Certain witnesses were examined for the plaintiff by interrogatories. They gave the facts known to them in their answers to the direct interrogatories, and where the same facts were again asked for in the cross interrogatories, they referred to their answers already given. Defendant's counsel moved to exclude them for want of fuller answers to the cross interrogatories. This was refused by the court.

W. M. & M. P. REESE; SEABORN REESE, for plaintiff in error.

F. L. LITTLE; JAS. A. HARLEY; L. W. THOMAS; J. H. LUMPKIN, for defendant.

SPEER, Justice.

Defendant in error brought his action against the plaintiff in error for personal injuries received by him in consequence of the alleged fault, negligence and illegal conduct of the agents and employés of the plaintiff in error, in and about the running of the trains of said company. He alleges "that on the 7th day of January, 1880, he had left his home about 10 o'clock in the morning, and was riding along the public road near by a point where the railroad track crosses the public road; that as the petitioner was approaching the point of said crossing, he observed an engine and train approaching said crossing from towards the east end of said railroad track; that petitioner was in full view of said engine and train when the same was first observed by him as well as afterwards: that he rode quietly and steadily along said public road until he had crossed and passed beyond said public crossing, and was ten or fifteen yards from said crossing, when the engineer of said train began suddenly and violently blowing the whistle of said engine, whereby plaintiff's horse became frightened; and he continued to blow said whistle until plaintiff's horse ran away with plaintiff, had thrown him from his saddle upon the ground in a violent and dangerous manner, and under the sudden fright produced by the running of said engine and train, and the illegal, violent, sudden and unnecessary blowing of said whistle, he was trampled under the feet of his horse, thereby crushing him and seriously and painfully injuring him," He alleges "if said whistle had been blown as required by law at the distance of 400 yards from said crossing, and continued to blow up to said crossing, and checking the speed of said engine, the horse of plaintiff would not have been frightened, and plaintiff's injuries would not have been sustained, and the blowing said whistle after plaintiff had crossed said railroad track and not before, and beginning to blow the same within sixty

or seventy yards of said crossing, and not before, was a gross, negligent and wanton act on the part of said company."

Under the proofs submitted and the charge of the court, the jury returned a verdict in favor of the plaintiff for the sum of \$1,000.00 damages. Whereupon defendant below made a motion for a new trial on various grounds, which are set forth in the record, which was refused by the court, and defendant excepted.

- I. We see no error in the court allowing the second amendment plaintiff filed to his declaration, as insisted upon by counsel for plaintiff in error, on the ground that the same was a new and distinct cause of action. It was an amendment charging in substance the same tort as originally complained of, and only set forth the more fully and particularly the circumstances and facts that led to the alleged tort.
- 2. Neither was there error in the admission in evidence of the interrogatories of the two female witnesses, on the ground that they had not answered fully the cross interrogatories. When the answers to such crosses referred to their answers to the direct interrogatories for their answers to the crosses, and it appeared the answers to the direct interrogatories did furnish full answers to the cross interrogatories complained of, it was not error to admit them.
- 3. It is also claimed that the court erred, after concluding his general charge to the jury, by giving the following written request in charge, as asked for by the plaintiff below: "If the evidence in this case shows that the plaintiff has been injured, and also that the defendant, the Georgia Railroad and Banking Company, as lessee of the Macon and Augusta railroad or otherwise by its agents, caused said injury and that injury was caused in this county, then the plaintiff would be entitled to recover of the defendant all damages he has proved in consequence of said injury unless the defendant by the evidence establishes one of the three following propositions, to-wit:

First: That the plaintiff consented to the injury.

Second: That he caused it solely by his own negligence.

Third: That the defendant, the Georgia Railroad, by its agents, exercised all ordinary care and diligence.

The law fixes the burthen of proof on the defendant in this case to prove one of the three above propositions. Upon proof of an injury by a railroad company in this state to any one, the law presumes the railroad company was at fault, and the burthen of proof is upon the company to show to the contrary, and it can do so in the three ways just before stated."

Also, because the court erred in refusing to give in charge to the jury the following written request as asked for by counsel for defendant below: "Now if you find from the testimony that the conduct of Thomas, at the time of the accident and just before, in meeting an approaching train, riding a horse that was known to be afraid of the cars, and on a saddle that was insecure was not that of a prudent man, and that he did not exercise ordinary care as already defined, then I charge you he cannot recover in this case, and you should find for the defendant."

It is insisted by counsel for defendant in error that the written charge given on their request as complained of, in which the court instructed the jury that the railroad company would be liable for damages unless it established one of the three propositions therein stated, to-wit: that the plaintiff consented to the injury; that he caused it solely by his own negligence; that the defendant exercised all ordinary care and diligence, was not error, because such was the rule recognized and stated by this court in the case of the Georgia Railroad vs. Neely, in 56 Ga., 543. But it will be seen that this rule in that case was applied, and intended to be applied, alone to suits for damages to property, and not to personal injuries which may be the subject matter of suit. For in the same case the judge pronouncing the decision

said: "I have purposely omitted from the grounds of this opinion any reference to section 2972 of the Code, which declares that "if the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover."

It is complained by plaintiff in error the court in this suit for personal injuries laid down a rule made applicable to damages to personal property, and thereby omitted and ignored the important ground of defence relied upon in this case, that "If the plaintiff by ordinary care could have avoided the consequences to himself by the defendant's negligence, he is not entitled to recover." Code, 2972. We are of opinion this complaint is well founded, especially in this case, when taken in connection with the fact that the defendant below by a written request asked the court to charge, and which charge the court refused, that "If you find from the testimony that the conduct of Thomas was not that of a prudent man, and that he did not exercise ordinary care as already defined, then I charge you he cannot recover in this case, and you should find for the defendant."

The written request of plaintiff below ignores and omits the main and chief ground of defence relied upon by the defendant below; and when it is thus omitted in a written request presented by plaintiff below and given, and the defendant below seeks to cure and correct that omission by asking in writing that the court should instruct the jury "that the plaintiff cannot recover if he could by the exercise of ordinary diligence have avoided the injury," we think it was such an error as entitles the party complaining to a new trial.

But it is insisted that the court gave this principle embraced in the 2972 section of the Code in his general charge to the jury, and that cures the error, if any. While this may be and is true ordinarily, yet, if when the general charge is completed, and the plaintiff for the purpose of grouping and presenting in a written request all the

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grounds upon which the defendant can prevent a recovery, reduces the grounds of the defence to three propositions of law, and the court gives such request in charge, and when the counsel for defendant in reply seeks to have given as a written charge another legal proposition which is correct, and upon which he relies for defence, and the court refuses so to charge, we think the whole, taken together, is not a fair submission of the law on both sides, and its tendency is to mislead the jury, and was therefore error. We do not wish to be understood as expressing any opinion upon the merits of this controversy. We are dealing alone with the law of the case. But as in our opinion the facts of the case did not demand the verdict rendered, notwithstanding the error of law, we are constrained to set aside the verdict and grant a new trial on the ground that we do not think in the particulars referred to the law of the case was properly submitted to the jury.

Judgment reversed.

# SIMMONS vs. GOODRICH, trustee.

- 1. That a surety is released from liability because of a change in the contract between the principals whereby the risk of the surety is increased, is a plea which the surety has the privilege of making, or not at his option. It is not a plea of which the principal can take advantage.
- (a.) If on the default of a principal his sureties were presumptively liable on his bond, and compromised with the payee thereof for a sum less than the amount of the bond, and the principal ratified the compromise, they could hold him liable for the amount of the compromise, and could transfer to the payee of the bond the security which they held from the principal for their indemnity.
- 2. Where title was transferred by deed, and a contract not of record entered into between the parties, one who received title under the grantee of the deed was affected by the recitals thereof, but not by the extraneous contract unless actual notice thereof was brought home to him.
- 3. The act of 1868 conferred authority on the Georgia Railroad to



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elect an officer to conduct its banking business and to require a bond of him.

- (a.) Full banking powers were conferred by the act of October 19th, 1870.
- (b.) The bond in this case provided for changing so as to meet the varying business of the company.

Principal and Surety. Contracts. Title. Railroads. Before Judge SNEAD. Richmond Superior Court. September Term, 1881.

Reported in the decision.

GANAHL & WRIGHT; A. D. PICQUET, for plaintiff in error.

Jos. B. CUMMING, for defendant.

SPEER, Justice.

The defendant in error brought his action of complaint in the statutory form, to recover the possession of an undivided one-half interest in two adjoining lots of land lying in the city of Augusta, on the south side of Green street, below Lincoln street. On the trial of the case, under an equitable plea filed by the defendant, the jury, under the evidence and charge of the court, returned a verdict decreeing a sale of the premises sued for, the payment of a certain amount to indemnify the plaintiff, and the overplus to be paid to defendant.

A motion was made for a new trial, which was refused by the court, and plaintiff in error excepted.

It appears from the record, that the land in controversy had been, on the 11th day of October, 1872, deeded by the plaintiff in error, with the consent of his wife, for the consideration of ten dollars, to Charles A. Platt and Joseph A. Eve, and at the same time the said Platt and Eve delivered to plaintiff in error their bond in the penal sum of three thousand dollars, with the following condi-

tion: "Whereas, the above bound, Charles A. Platt and Joseph A. Eve, signed as sureties the bond of James S. Simmons, given in the month of November, 1868, as teller of the Georgia Railroad and Banking Company; and, whereas, the said Simmons, on the 11th October, 1872, conveyed to said Charles A. Platt and Joseph A. Eve two houses.and lots situated on the south side of Green street, below Lincoln street, in the city of Augusta, and the said lots were conveyed unto the said Charles A. Platt and Joseph A. Eve for the purpose of securing them against whatever losses they may sustain by having signed the bond of James S. Simmons as sureties aforesaid; if the said Charles A. Platt and Joseph A. Eve do not sustain any losses as aforesaid, they are to reconvey to the said James S. Simmons the said lots of land. said Platt and the said Eve shall reconvey, or cause to be reconveyed, the said lots to James S. Simmons, this bond to be void else to remain of full force."

Afterwards, it appears that the said Eve and Platt admitted a liability to the Georgia Railroad and Banking Company, as sureties on the bond of the plaintiff in error, as teller of said company, and acknowledging the condition of this bond to have been broken by the default of their principal, Simmons, compromised the claim of the Georgia Railroad Company, against them as sureties, for the sum of five thousand dollars, each of them giving a several note to the company for \$2,500.00. On the 9th of August, 1878, Charles A. Platt, in settlement of his liabilities to the company on account of the default of Simmons, as teller (assepresented by his note held by the company), conveyed his own undivided half interest in the lots of land to Charles G. Goodrich, in trust for the Georgia Railroad and Banking Company.

On this title, the trustee brought his action to recover the possession of the undivided half of the premises of Jas. S. Simmons.

He pleaded, that he had fully settled with the company

to the extent of the default; that there had been a novation in the contract of tellership between himself and the company without the consent of the sureties, which increased their risk, and the default having occurred during the period of this novation, the sureties were discharged.

I. It appears from the record that Charles A. Platt, the grantor of the plaintiff below, was one of the sureties on the official bond of the defendant, James S. Simmons, as teller of the Georgia Railroad and Banking Company. That to indemnify him as such surety he conveyed the title to the undivided half of the property in dispute to the plaintiff below by his deed. It is very evident that the plaintiff below, having the legal title, was entitled to recover; but the defendant sought to defeat the legal title by setting up, by an equitable plea in his own behalf, the pleas of his sureties, and to do this he filed the pleas heretofore referred to.

Under the contract between Simmons and his sureties, he conveyed title to them to indemnify them against loss or damage on account of their suretyship. The measure of their principal's liability is ordinarily the liability of the securities. Any act that discharged him would discharge them, and if he was liable they would be presumptively so. For them to plead a release or discharge from liability for some cause not affecting the liability of the principal, was their privilege not his-it could avail them and not him-it was a defence they might offer, but would not enure to his benefit; or they might refuse and decline to make it. When they became his bondsmen, it was to make good his default, and if he contracted to indemnify them against his default, then so long as the default was unsatisfied, so long was his indemnity valid and binding. We think there was no error in the court disallowing and striking the plea of the defendant below in which he pleaded, that the sureties were discharged because there was a novation of the contract without the

consent of the sureties, by reason of which their liability and risk were increased, and that by the enlargement of the powers of said corporation the risk of the securities were increased.

These defences, if good at all, could avail the securities alone. They could make them or not, but they were not defences the principal could offer in a contest practically between himself and them.

The pleas that the plaintiff in error could offer to this suit were such as showed, first, he was not in default; second, that if in default, such default had been satisfied and discharged, and that thus the sureties had been saved harmless; or third, that if in default, he had offered to redeem the property by discharging the liability incurred and continued so to do. The great and controlling question in this controversy is, did the defendant, Simmons, owe the Georgia Railroad and Banking Company by reason of his default as teller, and for whose fidelity to his official trust these securities became liable. By his equitable plea he opened this question of his indebtedness to the bank, the evidence was submitted, and the verdict on this issue was against the defendant below. Whatever may have been the version of defendant as to his note endorsed by Cohen and the stock of goods, with the mortgage, turned over, being received as an accord and satisfaction at the time, yet the evidence further shows that neither the bank nor the securities so regarded it, for the securities gave, and the bank subsequent to this accepted. the notes of the securities to the amount of \$5,000.00, to be discharged from any further liability as sureties of said defendant on his bond as teller of the bank, and this action of the bank and the securities after this was fully ratified and confirmed by Simmons, the principal, by his paying for a year or more the interest on the notes the securities had given to the bank. How can it be said this default of Simmons was settled by the bank, when the evidence shows the bank received of Simmons and Cohen,

as the proceeds of the goods, about \$6,000.00, when the default amounted to \$20,000.00, or more and when, after all this alleged accord and satisfaction, the securities on this default assume to pay the sum of \$5,000.00, and which assumption and recognition of their liability to that extent for said default was recognized, ratified and partially discharged by Simmons, the principal, and against whom the default was alleged?

We think the law of the case under the evidence correctly and succinctly submitted by the court to the jury when he said "that if the sureties, being presumptively on the default of their principal liable to the bank, compromised with the bank for a sum less than the bond, and the principal ratified the compromise, then the sureties could hold their principal for the amount of the compromise, and could transfer to the bank the security which they held for their indemnity." The court further said defendant could defeat the legal title by showing that Platt did not in any way become liable as his surety or second by himself paying off such liability and releasing the land.

2. It is insisted the court erred in charging "the plaintiff acquired Platt's title as it appeared on the record unaffected by any contract between Platt and the defendant outside of the record, unless plaintiff had actual knowledge of such contract."

The contract here outside of the record was an agreement Simmons alleged he made with Platt when he executed him the deed to indemnify him, "that he (Platt) was to litigate or contest his liability as surety to the end of the law." We see no error in the court saying "that such a contract being outside of the record, unless actual notice thereof was brought home to the bank, it did not affect it." Plaintiff below was bound by all the recitals in the deed and record under which he claimed title—nor did he seek to assert any title inconsistent therewith—but to nothing outside, of which he had not notice.

3. There was no error in striking the three pleas relating to the banking powers of the Georgia Railroad and Banking Company. We think the act of October, 1868, conferred upon the corporation such powers as to the conducting of a banking business as authorized them to elect officers to carry on such business and to require of them bond and security for the faithful discharge of such a trust. We see no valid objection to the constitutionality of this act. Moreover that full banking powers were conferred on the company by the act of October 19th, 1870, is not questioned, and the bond given by these parties provides for its own enlargement to meet any varying business of the corporation by the following language: "Shall conform to and abide by such rules, regulations, orders and by-laws as are now of force, or may from time to time hereafter be made, passed or established for the government of said institution or its affairs."

Judgment affirmed.

# CULLY vs. BLOOMINGDALE, RHINE & CO.

An instrument signed by a husband and wife had the form of a deed; after the description, the instrument stated that the condition of the sale was that certain notes had been given by the husband to the grantee. It provided that if the debt should be paid, the deed should be void; that if the makers failed to pay, the creditors should give notice by certain advertisement, and sell at public outcry the equity of redemption, pay the notes and expenses of sale, and pay over the balance to the debtors. Homestead was waived:

Held, that the instrument was a mortgage only and conveyed no title; and upon the death of the husband the wife was entitled to a year's support out of such property.

(a.) The title being in the husband, a sale of the property after his death would not affect the wife's right to a year's support.

Mortgage. Title. Year's support. Before Judge FAIN. Dade Superior Court. December Term, 1881.

Reported in the decision.

T. J. LUMPKIN; E. D. GRAHAM, for plaintiff in error.

W. N. & J. P. JACKOWAY; R. J. McCAMY, for defendants.

SPEER, Justice.

It appears by the record that D. M. Cully, husband of the plaintiff in error, died in October, 1879, and in January, 1880, his widow applied for a year's support for herself and infant daughter out of the estate of her deceased husband, which by commissioners duly appointed was set apart in property, and included among other things a store house and lot in Rising Fawn, Georgia. The defendants in error filed objections to the return of the commissioners upon the ground that they had title to said store house and lot. From the decision of the ordinary an appeal was taken to the superior court, and on the trial there it was agreed to submit both the law and facts to the judge, without the intervention of the jury, and he found that the plaintiff was not entitled to a support out of said store house and lot, but that the title was in the defendants in error to said property at the death of the intestate, to which judgment plaintiff excepted.

The title upon which the defendants in error rested their claim was under the following paper:

"This indenture, made and entered into this the fifteenth day of April, 1879, by and between D. M. Cully and Fannie A. Cully, wife of said D. M. Cully, for and in consideration of the sum of one hundred dollars to us in hand paid, the receipt of which is hereby acknowledged, do bargain, sell, and do hereby convey unto Bloomingdale, Rhine & Co., of the city of Philadelphia, Pennsylvania, one house and lot in the town of Rising Fawn, in the county of Dade, state of Georgia, and more particularly described as follows, to wit: Fronting the east side of the Alabama Great Southern railroad twenty-five feet, and running back of uniform width one hundred feet, it being the lot that the said D. M. Cully bought of——, and on which a new store house is built, all in the county and state aforesaid. Now, the conditions of this sale are as follows, to-wit: The said D. M. Cully has this day given his notes to the said Bloomingdale, Rhine & Co. for the

following sums, to-wit: One for one hundred dollars, payable thirty days after date, and being dated April 15th, 1879, and another note due six months after date, for three hundred and fifty dollars, and bearing date April 15th, 1879; all of said notes bearing interest from date except the last. Now we, the said D. M. Cully and Fannie A. Cully, parties of the first part, do acknowledge ourselves to be due the said parties of the second part, the several sums or amounts above set forth, and to secure the payment of the same we have hereby made this our deed to said tract or parcel of land, situated as before set forth, together with the house thereon, but if the parties of the first part do well and truly pay the said note and interest that may accrue thereon, then this deed is to be void and for nothing held, but if the said parties of the first part fail to pay the said note, together with the interest that may accrue, then the said parties of the second part may, after giving thirty days' notice in writing, at the courthouse, in the town of Trenton, in the county of Dade, state of Georgia, and also in the town of Rising Fawn, Georgia, by their agent or attorney expose to sale the said house and lot to the highest and best bidder, on three and six months time in bar of the equity of redemption, taking note and good security of the purchaser, and retaining a lien on the property for the purchase money, and after paying all the above described notes together with all the interest and costs of selling, the remainder of the money to be paid over to the parties of the first part, or their lawful representatives; and all the parties of the first part covenant with the parties of the second part, that the above property is unincumbered except eighty dollars of purchase money to P. Malloy, which is not due, for the grounds on which the house stands and for which he has notes, one for forty dollars, due six months after date, the first of January, 1879, and one for forty dollars due twelve months after date, dated 1st of January, 1879, with interest from date; and we, the parties of the first part, waive all exemptions of homestead and all other exemptions as to the above named house and lot. In witness whereof." etc.

The question presented is whether, under this paper, the title to the property therein described passed to defendants in error so as to defeat the claim of plaintiff in error in the same for her twelve months' support, as the widow of D. M. Cully. A mortgage is, under the Code, "a mere security for a debt, and passes no title." "No particular form is necessary to constitute a mortgage. It must clearly indicate the creation of a lien, specify the

debt to secure which it is given and the property upon which it is to take effect." Code, §§1954, 1955.

Tested by these requisites, the paper under which defendants in error claim title is a mortgage deed, with power in the mortgagees, on default of payment within a certain time and upon certain notice, to make sale of the property on certain credits, so as to "bar the equity of redemption." The paper clearly indicates the creation of a lien "to secure the payment of the notes" therein described; and the property upon which the lien attaches is described; moreover all exemptions of homestead are expressly waived on the part of the makers.

The relation of debtor and creditor existed and continued to exist between the mortgagor and mortgagee up to his death, and moreover on the payment of the sums set forth as due in said instrument, it is declared the paper "shall be void and for nothing held." These various ear marks of the instrument can lead to but one conclusion, and that is that the paper was intended as a security for the debt. If the mortgagor failed to pay, whose title was to be sold as provided for? what was to be sold? "The equity of redemption"—and the proceeds were to be paid out to the costs, expenses of sale, then to the debt, and overplus, if any, to the mortgagor. We think the court therefore, erred in holding that the title of this property passed to the defendants in error, but that the same remained in the deceased husband, and so existed at the time of his death, and hence that the court below erred in not sustaining the application of plaintiff in error to have said property set apart as a portion of the twelve months' support assigned her as the widow of her deceased husband. 9 Ga., 151; 7 Cranch, 237; 61 Ga., 339; 54 Ib., 441.

The title to the property being in the deceased, the sale of the property after his death under this mortgage, could not affect the widow's right to her twelve months' support. 8 Wheat., 174; 25 Ga., 571; 65 Ib., 312.

Judgment reversed.

## JONES vs. THE STATE OF GEORGIA.

- In Intimate association by a sheriff with the jury while they are charged with a cause, such as occupying the same bed, is reprehensible, and would be sufficient ground for setting aside a verdict, if it be not satisfactorily shown that no improper influence was exerted by such officer, and no injury resulted to the defendant therefrom.
- Misconduct on the part of the jury in a criminal cause, from which
  injury might have resulted to the defendant, throws the burden on
  the state to show affirmatively that the defendant was not injured
  thereby.
- 3. When such alleged misconduct is the use of spirituous liquors by the jury during the trial, affidavits from those persons who used the liquors, and others of the jury, showing that they were used with great moderation, and not to such an extent as to even slightly affect the capacity of any member of the jury, will release the state from this burden.
- 4. Though the person outraged swears that the crime of rape was actually committed by the prisoner, yet where an attempt is made to impeach her testimony, and her age and the circumstances surrounding the criminal act render her testimony on this subject doubtful, the jury may disregard it and find the accused guilty of an assault with intent to rape, there being overwhelming evidence of such assault.

Criminal Law. Practice in Superior Court. Officers Jurors. Charge of Court. Before Judge STEWART. Pike Superior Court. October Term, 1881.

Henry Jones was indicted for rape. On the trial, the evidence for the state was in brief, as follows: The girl, on whom the attempt was committed, testified that defendant came to her house, and enticed her into an adjoining wood by asking her to show him the way to a neighbors, promising to give her a quarter; that when they came to the wood, defendant gave her whiskey to drink, then threw her down and got on her; she did not consent to his doing so; he put his private into her; she screamed and he choked her; defendant kept her there until a Mr. Hemphill, and two others, came up, when he

got up and ran; she is between eleven and twelve years of age.

Another witness (Hemphill) testified as follows: He was walking over his farm, about 11 o'clock Sunday morning, in company with two other men, when he heard a noise like one in distress, at a place about two hundred yards distant; on going to the spot, he saw defendant on top of Louisa, in the act of having sexual intercourse with her; he got within nine steps of them when defendant, seeing him, got up and ran; Louisa got up, fell back, and would have fallen a second time but witness caught her; she said she did not know the man, had never seen him before; she was not intoxicated; witness saw defendant an hour later, when he was arrested, and recognized him; identified him both by his face and clothing; defendant's legs were muddy about both knees; when asked to account for it, said he had fallen off a bridge. It had been raining and was muddy in the woods. The scene of the crime showed signs of the ground being trampled and torn up. Defendant was arrested at a house a mile and a half, or two miles distant, about two or three hours after the crime was committed.

Other witnesses, who were with Hemphill, testified to the fact of seeing the parties together, as he had done, but did not know who they were. Others testified to seeing him near the scene of the crime about the time of its commission, and leaving it at a rapid gait.

The evidence of the defence was mainly in impeachment of the state's witnesses, and was, in brief, as follows: The marshal of Griffin (Bridges) testified that Hemphill told him he was walking through a piece of woods on his farm, and heard some little noise which attracted his attention, and about thirty steps from him he saw a man and woman down on the ground, but could not see who it was; the man got up and he (Hemphill) made a little noise, when the man ran; that after Jones was arrested he identified him by his clothing.

Watson, the justice of the peace before whom the preliminary trial was had, testified that Hemphill remarked in his presence, that "he did not know that he could swear positively to Jones being the man, and he believed he ought to be turned loose." Other witnesses testified to similar remarks of Hemphill, expressing doubt as to the identity of the prisoner.

It was in evidence that the defendant, while under arrest, pointed out to those having him in charge, the bridge from which he said he had fallen, and showed marks which he said his knees had made in the mud. There was also testimony that, on the preliminary trial before the magistrate, an opportunity was given the girl (Louisa) to identify the man (Jones), but she did not do so; that she was asked if Jones was the man, and replied she did not know; also, that she had made contradictory statements as to whether defendant actually accomplished his purpose or not, having stated at the preliminary trial that he pulled up her clothes and tried to have intercourse with her.

There was much more testimony not material here. Defendant made a statement to the effect that he had not been on Hemphill's place, and that he had never seen the girl before the preliminary trial. The jury found a verdict of guilty of assault with intent to rape. The defendant moved for a new trial; the motion was overruled, and defendant excepted on the grounds stated in the decision.

- F. D. DISMUKE; BOYNTON & HAMMOND; F. L. HARALSON, for plaintiff in error.
  - E. WOMACK, solicitor general, for the state.

SPEER, Justice.

Plaintiff in error was indicted for the offence of rape, and convicted of assault with an attempt to commit rape. He made a motion for a new trial on various

grounds, as appear in the record, which was refused and he excepted.

The main grounds relied upon before this court for a reversal of the judgment of the court below were:

- (1.) The misconduct of W. P. Bussey, sheriff of said county, for entering the room at night where the jurors were lodged and under the control of the bailiff and having the door closed after him. How long he remained in the room the record does not disclose.
- (2.) Because the court instructed the jury "that if they believed the defendant was not guilty of the offence of rape, they might consider whether or not he is guilty of the offence of an assault with an intent to commit a rape. There being no evidence to justify the charge."
- (3.) Because the court allowed a witness (McWilliams) to be sworn and testify for the state after the argument to the jury had commenced.
- (4.) On account of the misconduct of the jury in being allowed, during the trial, intoxicating liquors and other refreshments, without the consent of the court.
- 1. It appears from the record that the trial of the defendant lasted several days, and at night the jury were removed from the court room to a house to be lodged and fed during the recess of the court. That owing to the length of the trial the jury were put under charge of special bailiffs, whose duty was to guard them from intrusion and prevent their separation, etc.; and during the night the sheriff of the county, W. P. Bussey, relieved one of the bailiffs from duty and assumed the duty of taking care of them. It does not appear from the evidence that his entrance into the lodging room of the jury was at any time during their deliberations, but otherwise, after they had been removed from the jury room at the court house to their lodgings. The affidavit of W. P. Bussev establishes the fact that in his conduct in guarding and taking charge of the jury, "he strictly observed all the rules and regulations as prescribed by the special oath ad-

ministered to bailiffs" on taking charge of a jury, and his affidavit in this respect is fully sustained by several of the iurors who were upon the panel. It is well known to us that under the law and custom of the courts the supervision of juries empanelled and the bailiffs in attendance supon them, is subject to the general supervision of the It is through him arrangements are made to feed and lodge them during criminal trials, and, as a consequence, much is left to his prudence and discretion, to see that they are properly provided for and guarded from outside influence. In doing this his presence in their lodging rooms for such a purpose when they are not engaged in their deliberations would not necessarily vitiate a verdict, still, intimate association with any of them, such as occupying the same bed, is reprehensible and improper—would be a grave irregularity, and void a finding if the affidavits did not satisfy us that no improper influence was exerted and no injury resulted to the defendant from this cause. If the affidavits of both the officer and jury did not relieve his conduct from all suspicion of wrong to the state or defendant, we should be constrained to reverse the judgment and order a new trial.

2. As to the misconduct of the jury, as complained of in one of the grounds for new trial, we recognize the rule laid down by this court, "that misconduct on the part of the jury while they have the case under consideration, from which injury might have resulted to the defendant, throws the burden upon the state to show affirmatively, that no such injury has resulted." 45 Ga., 225. Yet in looking into the affidavits filed in support of this ground, while it appears from affidavits of some of the jury alone, that they at their own expense procured, through the bailiff in charge, and used during said trial, spirituous liquors, yet the affidavits of the same and other jurors establish the fact that it was used in extreme moderation, and no juror was under the influence of the same to the extent of impairing or affecting in the slightest degree his

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capacity as a juror. Moreover this fact of the use of refreshments in the jury room alone appears by the affidativits of the jurors themselves, and the rule is too well settled, that such evidence will not be received for the purpose of impeaching the verdict they have rendered. 45 Ga., 225. On these grounds of the motion as to the alleged misconduct of Bussey, the sheriff, and of the jury pending said trial we are satisfied from a careful inspection of the affidavits filed in support of the motion and in vindication of the officer and jury, that the state has shown affirmatively that no injury has resulted to this defendant for either of the causes complained of.

3. As to the complaint made to the charge of the court instructing the jury, "That if they believed the defendant was not guilty of the offence of rape, they might consider whether or not he is guilty of the offence of assault with intent to commit a rape," we think there is sufficient evidence in the record to justify the charge as given and sus tain the verdict as rendered. It is true the testimony of the little girl, eleven years old, the victim of this outrage, sustains the accusation that the higher offence was committed, but when it is remembered her testimony was sought to be impeached by the defence by a number of witnesses by proving contradictory statements; when her age and size is taken into account, her physical condition at the time and immediately after the outrage, laboring as she was, under the influence of liquor which the attempted ravisher forced down her throat before the attack, there might be a grave doubt as to whether her testimony alone was sufficient as to the actual perpetration of the offence of rape. But unfortunately for the defendant, there were other witnesses who saw him in the act of making the attempt to commit this offence upon his helpless victim. These witnesses saw and testified to enough to satisfy any fair and impartial mind that he was seeking and attempting to perpetrate the offence. He had her upon the ground, was upon her person with her clothes up, and was

making every effort in the midst of her choking and smothered cries for help, to commit this outrage. Whether he consummated his purpose these witnesses could not testify; that he attempted to do so no shadow of a doubt exists. The jury might well have deemed it wisest in favor of the defendant, to rest their verdict upon the undoubted testimony of these eye witnesses to this cruel wrong, rather than to believe, under the disadvantages of her surroundings at the time, the full testimony as to the consummation of the higher offence, and which was alone supported by the testimony of the victim. In the case cited by counsel for plaintiff in error Kelsey vs. State, 62 Ga., 558, there was but one witness to the offence charged, and that was the person upon whom the alleged outrage was perpetrated. She was a woman of mature age and swore positively to the offence of rape upon her person by the accused, and yet in the face of this testimony the jury found the accused guilty of an assault with intent to commit a rape. Well might such a verdict be set aside as being against the testimony and law. But in this case, as we have said, there was evidence before the jury sufficient to sustain either offence: it was for them to say to whom they would give credit. This was their province, and if in favor of the accused, they returned him only guilty of the lower grade, he of all others has the least cause of complaint.

4. As to the introduction of the witness for the state (McWilliams) after the argument commenced: his presence it appears was unknown to the state's attorney when he closed for the state. It was in the discretion of the court to allow him to testify, and we will not control it.

Judgment affirmed.

## HAMMOND & HINSON vs. CROSBY & COMPANY.

- t. A sheriff's deed, though unaccompanied by the judgment or execution, is good color of title as a starting point for the statute of limitations to run, if possession be taken under it.
- 2. A quit claim deed is good as color of title, and with possession may ripen into a perfect title. The fact that it is a quit claim deed does not of itself negative the presumption of good faith in one who holds under it.
- One who relies on title by prescription and seeks to tack to his own the possession of prior holders to make out the prescription, must show that their possession was bona fide.
- 4. When a person is shown to be notoriously in possession of land by occupancy, cultivation and the like, his possession is presumed to be adverse until the contrary is shown, and such possession, when under written title, extends to the boundary of the tract described in the deed.
- 5. Where one sets up a prescription with adverse possession, and the opposite party replies by alleging fraud, the proof to avail must show fraud extending to the party so pleading the prescription.
- 6. The verdict was sustained by the evidence.

Title. Prescription. Deeds. Before Judge SIMMONS. Appling Superior Court. October Term, 1881.

Reported in the decision.

ROBERTS & DELACY, by HARRISON & PEEPLES, for plaintiffs in error.

G. J. HOLTON & SON, by JACKSON & KING, for defendants.

SPEER, Justice.

Crosby & Co. brought their action of trespass against the plaintiffs in error to recover damages alleged to have been committed by them by boxing the pine timber growing on lot 268 in the 2d district of Appling county, said boxing being done for turpentine purposes. To this suit Hammond & Hinson vs Crosby & Co.

defendants pleaded the general issue. The case came on for trial, and under the evidence and charge of the court, the jury returned a verdict for plaintiffs. Defendants moved for a new trial, which was refused, and they excepted.

Plaintiffs below introduced in evidence a deed made by Gardner Wiley, sheriff, to G. J. Holton, to the lot in dispute as color of title, duly attested, and dated June 17th, 1872, recorded November 26th, 1880. Second, a deed from Holton without warranty (except against the maker) to Henry Mims, dated February 22d, 1873, recorded November 26th, 1880. A quit claim deed from Henry Mims to Silas A. Crosby dated February 17th 1880, recorded November 26th, 1880. A deed from S. A. Crosby to S. A. Crosby & Co. (plaintiffs), dated May 3d, 1880, recorded November 25, 1880, the said deeds embracing the land in dispute.

Defendants offered a written evidence of title as follows:

Plat and grant from state of Georgia to lot in dispute to William A. Gurley, dated June 9th, 1842. Letters of administration on estate of Wm. A. Gurley to Thos. G. Lawson, dated February 7th, 1871. Certified copy of order of court of ordinary for sale of wild and cultivated lands of the county of Appling, embracing lot in dispute. A deed from Lawson, administrator of Gurley, to L. F. Hinson and John Hammond, dated August 27th, 1880, recorded November 9th, 1880.

Under the admission in evidence of these title deeds, and the parol evidence submitted, the jury, under the charge of the court, returned a verdict for the plaintiff.

The defendants made a motion for a new trial, which was refused, and they excepted.

This action for trespass upon this lot of land brought by the plaintiffs below, rests upon a title they claimed to have made out by prescription, to wit: Seven years adverse possession held *bona fide* under a claim of right. Hammond & Hinson vs. Crosby & Co.

The defendants rely upon a regular chain of title from the grant down regularly executed to the defendants alleged to be trespassers, and the rights of the respective parties are to be determined by the answer to the question, which of them exhibited the better title.

Plaintiffs below claim as the origin of their title to the lot and as color of title, a sheriff's deed made to Bolton, dated June 17th, 1872, and possession thereunder up to November, 1880, when it is alleged the trespass was com-Holton, without warranty (except as against the maker), on February 22d, 1873, conveyed to Mims. Mims by quit claim conveyed, on February 17th, 1880, to S. A. Crosby, and he by deed May 13th, 1880, conveyed to plaintiffs below;—all of these deeds embraced the lot in dispute. The land it is claimed was sold as the property of Hayes, and at the date of the sheriff's deed Holton, the purchaser, was put in possession; and the tenant then in possession attorned to him. Holton sold land to Mims and put him in possession, declined to make Mims a general warranty deed for the sole reason that he had not held the lot for seven years under his purchase at sheriff's sale. Mims under his purchase went into possession, and continued therein till his sale to S. A. Crosby. During the time he held it planted every year six acres-all of the open land on the lot. Houses on the place were sometimes vacant, sometimes occupied by his tenants. some doubts about his title, but thought it good. did not communicate to Crosby his doubts about the title. Crosby went in under his purchase from Mims, and has held it ever since. l'laintiffs proved by another witness he had passed over the land two or three times a year for the past seven or eight years and saw a small field of oats growing on it. Improvements consisted of two or three log houses and about six acres cleared on it.

Hinson, sworn for defendant, testified, while Mims was in possession of lot, heard him say he had no faith in his title. No one had been in possession for twelve

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months previous to the purchase of same by Hinson and Hammond, on 27th of August, 1880. In the fall of 1879, Mims had sowed the open land on the lot in oats, and did so every fall while claiming the land.

James Johnson swore in May, 1880, he went to Mims to buy the land and offered to give him the value of it if he would make him a warranty deed. Mims refused, and said he did not consider his title worth a d—n.

Such, in substance, is the parol evidence on the trial.

A sheriff's deed with possession under it unaccompanied with the judgment or execution is good color of title as a starting point for the statute of limitations. 22d Ga., 56; 9 Ib., 440. It is also true, that possession resting on a quit claim deed, when bona fide made on the one side and bona fide received on the other, may unquestionably ripen into a title deed and defeat the negligent owner of a better title. 50 Ga., 629; 58 Ib., 386. We also recognize the rule that where one relies on his title by prescription he cannot tack to his own possession the possession of prior holders to make out his prescription, unless he shows the character of that possession as to its good faith, etc., and that he holds under parties so having bona fide acquired possession. 44 Ga., 297.

The evidence in the record makes no attack upon the bona fides of Holton's title, and possession from the sheriff, dated in June, 1872. He not only bought but went at once into possession and so continued until he sold to Mims. Mims followed Holton by purchase and held, occupied and cultivated under a claim of right till he sold to Crosby, on the 17th of February, 1880. The attack is directed to the bona fides of Mims' possession and claim of right.

Tacking Mims' possession to that of Holton, from June 1872, to 17th of February, 1880, if the same was adverse and bona fide under a claim of right, then the prescriptive title in Mims was complete, and Crosby, who was an innocent purchaser from him without notice, stood pro-

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tected, not only in his title, but also in his possession. It is true, the law allows prescriptive title by tacking to ripen under a quit claim title when the character of the possession of those under whom he claims is shown to be in good faith. A mere quit claim title will not of itself negative the presumption of good faith in those holding under it. 50 Ga., 629. And in the absence of evidence to the contrary, the presumption is that the party claiming possession under it does so in good faith. So, it has been held a quit claim title taken in good faith is sufficient color of title upon which to base title by prescription, when accompanied by seven years' possession. 58 Ga., 306. Though Mims, therefore, may have held under Holton by a quit claim title alone, still if he entered in good faith under this title (and so the jury found) and held exclusive adverse possession for the space of seven years, his prescriptive title ripened as against a better title in one negligent in asserting it.

When one is shown to be notoriously in possession by occupancy, cultivation, and the like, his possession is presumed to be adverse until the contrary is shown, and such possession when under written title extends to the boundary of the tract in the deed. 64 Ga., 156; 65 Ib., 402. And where one sets up this prescription and the adverse party replies by alleging fraud, the plea to avail must be shown by proof to extend to the party so pleading the prescription. 4 Ga., 308.

Applying these principles of law to the facts of the case, we think the verdict was sustained by the law and the evidence, and we see nothing in the refusals to charge or the charge as given, as excepted to by the plaintiffs in error, that calls for a new trial.

Judgment affirmed.

McWilliams et al vs. Anderson.

## McWilliams et al. vs. Anderson.

Trespass against an officer for wrongful levy on homestead property may be maintained by the wife or family of the debtor without making the debtor himself a party plaintiff.

2. When such action is brought by the wife and children of the debtor, an amendment making him a party plaintiff, either individually or as a prochein ami, should not be allowed. Such an amendment would introduce a new and distinct party, in a case not provided for by law.

Practice in Superior Court. Amendments. Homestead. Before Judge HARRIS. Coweta Superior Court. September Term, 1881.

Reported in the decision.

R. S. BURCH; J. W. POWELL; W. A. TURNER, for plaintiffs in error.

J. B. S. DAVIS; J. S. BIGBY, for defendant.

CRAWFORD, Justice.

This suit was brought under section 2027 of the Code, by Incy McWilliams and her minor children, against the defendant, as sheriff, for trespass in levying upon the homestead set apart to Andrew J. McWilliams, the husband and father of the plaintiffs.

The defendant demurred to the declaration on the ground that the said Andrew J. McWilliams was not, but should have been, a party to the suit; the demurrer was sustained, and plaintiffs counsel then moved to amend by making said McWilliams a part, which motion was refused by the court, and to both rulings the plaintiffs, by counsel, excepted.

The plaintiffs counsel thereupon moved the appointment of the said McWilliams as prochein ami for the minors to conduct the suit for their use, which motion was

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granted by the court. Whereupon defendant's counsel demurred to plaintiffs' declaration as amended, which said demurrer was sustained by the court, and the case dismissed. To this last ruling plaintiffs also excepted.

Where any officer knowingly levies on property, which has been set apart as a homestead, except upon the affidavit of the plaintiff, his agent, or attorney, that the debt on which such execution is founded, is one from which the homestead is not exempt, he is guilty of trespass, and for which trespass the wife or family or the debtor may recover for their exclusive use. Code, §2027.

We think that, under this authority, it is clear that the right of action existed in the plaintiffs in this case, and that the judge erred in sustaining the demurrer to the declaration, on the ground that Andrew J. McWilliams was not made a party. On the motion to amend by making him a party, we the think that the judge ruled correctly.

Amendments, under our practice, are most liberally allowed, but they do not go to the extent of allowing a new and distinct party to be made in a common law suit, except in cases where it is expressly provided by law. This is not such a case; and it was error in the court to have allowed the said party made, although he was only the *prochein ami* of the minors. 64 Ga., 519; 65 Ib., 464; 61 Ib., 161; 63 Ib., 679; Code, §3480.

The amendment having been allowed, the declaration as amended was demurred to, the demurrer sustained, and the case dismissed, which ruling of the court is assigned as error.

That it was illegal to have made this new party to the suit, we have already held; so long, therefore, as an illegal amendment stands, the declaration is demurrable, and to dismiss the suit was correct; but holding, as we do, that the right of action is maintainable by the original plaintiffs, there was no necessity for any other party, and all rulings to the contrary were error.

Judgment reversed.

#### Beall zw. Rust.

### BEALL vs. RUST.

I. B. brought trover against R. to recover certain cotton. R. filed his bill to set off against such recovery charges for storage, commissions and expenses upon that and other cotton due him by B., to assert a lien on that lot for the entire charges, exceeding in value the cotton in suit, and to enjoin the trover suit. B. answered setting up counter claims for overcharges, etc.:

Held, that the case was a proper one for equitable relief.

- (a.) Appearance and pleading to the merits admits jurisdiction.
- (b.) A bill for injunction against a suit at law brought by a non-resident plaintiff will be retained to grant relief as to all matters involved in a proper settlement of the litigation pending at law.
- 2. The verdict was not contrary to the charge.
- (a.) While large items of cash may not be proved by entries on a merchant's books, it would seem that where such items form a part of the regular business of the party making such entries, as of a factor or banker, they might be so proved.
- 3. Where one bought a lot of cotton from a warehouseman, and after some months resold to another, the cotton remaining in the warehouse, but when the first purchaser went to make delivery to his vendee he discovered that the warehouseman had, before the first sale, sold nineteen bales of the cotton to a third party and could not deliver it, whereby the purchaser was compelled to account to the second vendee for the deficit at an advanced price, under a bill in equity to settle the accounts between the warehouseman and his vendee the damages to be allowed the latter would be measured by what he was compelled to pay his vendee for the deficit, and not by what he originally paid for the cotton.

Jurisdiction. Verdict. Contracts. Damages. Evidence. Before Judge FLEMING. Dougherty Superior Court. April Term, 1881.

Reported in the decision.

B. H. HILL; W. E. SMITH; C. B. WOOTEN, for plaintiff in error.

R. F. LYON; D. H. POPE, for defendant.

Beall vs. Rust.

SPEER, Justice.

Jeremiah Beall, of Baldwin county, brought action of trover against Rust, in Dougherty superior court, for the recovery of certain 52 bales of cotton, known as the Tyas cotton. Whereupon Rust filed against Beall his bill in equity for injunction and relief, alleging that in 1863, one Tyas stored said lot of cotton in the warehouse of Sims & Rust, in Albany, Ga.; that soon thereafter Y. G. Rust, one of said firm, sold said cotton to said Beall, who left the same on storage with said Sims & Rust, where it remained until the filing of said bill; that after said cotton was left in store Sims died, leaving Rust as surviving partner in possession of the warehouse, as factor, etc. The bill alleges further, that Beall had stored in said warehouse about 3,531 bales of cotton besides said 52 bales, for certain reasonable, just and customary charges, as well as for all advances, expenses and commissions on account of said cotton; that on the 1st of May, 1866, there was a balance of \$6,001.00 due said Rust on this account, which did not include said 52 bales, and for storage, interest and commissions on the latter the bill sets up a claim of \$2,214.48, in addition to the \$6,001.00 aforesaid; and it is alleged that said two amounts constitute a special lien on all of the cotton of said Beall stored in said warehouse. Further, it is alleged that complainant permitted Beall to ship all of said cotton to another market, except the 52 bales, on the promise of Beall to pay said \$6,901.90; that Beall has refused to pay said account, but has brought his action of trover to recover of him said 52 bales.

Further, it is alleged that Sims, the partner of complainant, in 1863, did sell to Beall a large lot of cotton, then on storage, and belonging to a planter, and after the sale thereof it was discovered that 19 bales of said lot had been previously sold by Sims to one Hoge, and as soon as the error was discovered the amount Beall gave for the 19 bales was placed to his credit, on complainant's books, the amount being \$755.00; that Beall did not consent to

this, but insisted he was entitled to the value of said cotton at the time and place of delivery, or to the highest intermediate value; that he had sold said 19 bales to John P. King, together with the lot to which it belonged, and that when the time of delivery came, and it was not delivered to said King, Beall insisted he should be allowed \$2,154.40, the amount which he had refunded to said King on account thereof; that failing to agree in the premises, the matter was referred to arbitration, which awarded to said Beall \$2,154.40 on account of said 19 bales of cotton; that Rust filed exceptions to said award, which are still pending.

The bill prays for an order to sell said 52 bales, and, after deducting the expenses, for the proceeds to be applied to Beall's credit, that he account for the balance due complainant, and that, as said set-off could not be made at law, prayed the same may be allowed in equity and the action of trover be enjoined.

Beall filed his answer, denying the indebtedness claimed by Rust, but alleged that Rust was indebted to him a large sum, not only for said 52 bales of cotton, but for over charges, and over payments, etc., etc.

On the trial of said case, the jury found a verdict for Rust for \$6,064.08, with interest from 15th June, 1869.

Whereupon plaintiff in error made a motion for new trial, on various grounds, as are set forth in the record, which was overruled by the court, and he excepted.

- I. Error is assigned on the ground that the court erred in not dismissing complainant's bill:
  - (1.) Because there was no equity in it.
- (2.) Because the court had no jurisdiction to hear and determine such a case against Beall, a resident of Baldwin county, Georgia, and not a resident of Dougherty county, etc.

As to the question of jurisdiction, it may be replied the plaintiff in error appeared and pleaded to the merits, and thereby not only admitted but waived jurisdiction. Code, §§3460, 3461.

#### Beall or. Rust.

Beall brings his suit in trover to recover certain cotton. Rust, in equity, seeks to set-off against such recovery charges for storage, commissions and expenses due him by Beall, not only upon the cotton sued for, but other storage, expenses, etc., due by Beall to him for other cotton he had previously in store for Beall, and upon which the expenses were unpaid, and which he alleges were likewise a lien on the cotton sued for. We are inclined to think that this claim of the defendant, Rust, constituted such an equitable, if not a legal, defense to that suit, taken in connection with the cross claims set up by Beall in his answer for "over-charges for storage and over-payments" thereon on the cotton in store, as well as that already shipped out, that a bill was not only necessary but indispensable to settle all the questions between the parties. The rule is, as to suits for injunction filed as ancillary to suits at law, they are maintainable against a non-resident plaintiff in the suit at law, and will be retained to grant relief as to all matters involved in a proper settlement of the litigation pending at law. Clark vs. Beall, 39 Ga., 533. Here Beall selected Dougherty county as his forum to bring Rust to account for the fifty-two bales of cotton. And as to the counterclaims set up by Rust, we think they are vitally involved in this suit brought by Beall to have all these matters properly adjudicated.

2. We cannot see that the jury found contrary to that portion of the charge of the court, in which he instructed them, "That the books of the complainants are not evidence of cash item charges, but such cash item charges must be sustained upon evidence or outside of the books." Even under the rule prescribed, we are not prepared to say there was not sufficient evidence to sustain these "cash items" outside of the evidence of the books. Neither are we prepared to indorse the rule thus given in reference to books kept by a factor or commission merchant, whose ordinary and constant business is to make cash advances to customers. It is true, such a rule was recognized by

#### Beall pr. Rust.

this court in the case of a merchant's books whose usual and ordinary business was the sale of goods and merchandise (64 Ga., 243), but we are not inclined to extend this rule to the books of factors and commission merchants, whose ordinary business is to make cash advancements to customers. In the case of Bagley vs. Robertson, 57 Ga., 145, this court remarked: "There would seem to be good reason for admitting books to prove very small sums of cash advanced in the regular course of business, but where the amount is of such importance that a receipt or some written evidence might be reasonably called for by the party, books alone would be unsafe; of course, in particular lines of business, such as banking, etc., usage might be found to extend to all amounts."

Was the verdict contrary to the charge of the court as complained of in the fourth and fifth grounds of the motion? The instructions given by the court were clear and forcible on these points, and as favorable to plaintiff in error as he was entitled to expect, and we think there is evidence sufficient to sustain the verdict as found on these points. The liability of defendant for storage under general custom, and the weight and credit to be given to the admissions of parties, was clearly submitted.

3. It is further insisted that the court erred in charging the jury, as complained of in the seventh ground of the motion, that the measure of damages as to the nineteen bales of cotton that Beall was entitled to recover of Rust on account of his failure to deliver them, "was the actual money Beall paid for said cotton, with interest."

The evidence shows that Beall bought a lot of cotton from Rust, consisting of eighty-nine bales, at a certain price. That, subsequently, Beall sold the whole lot to King, at an advanced price; that when he sought to deliver this lot to King from the warehouse of Rust, where it had been stored, it was discovered that nineteen bales of the lot had previously been sold by the firm to one Hoge, and, as a consequence, Beall was compelled to ac-

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count to King for the value of the nineteen bales he so failed to deliver at a cost of \$2,154.60.

The parties are in a court of equity, and we cannot regard the rule as to the measure of Rust's liability to Beall for these nineteen bales of cotton as given by the court just and equitable to Beall. When Rust found out that by reason of this mistake of the firm in selling these nineteen bales to Hoge, that he could not deliver them as he agreed to do to Beall, he promptly gave Beall credit for the same on his books at the price he had bought them at some months before, and this the court seems to have regarded as a proper rule of settlement. To this we cannot assent. Some time had elapsed between the two sales, and cotton had largely advanced in price; what had cost Beall \$715.00 when he purchased from Rust, he sold to King for \$2.154.00; and when he failed to deliver, which resulted from the fault of Rust or of the partnership, we are of opinion that Rust should indemnify him fully in the amount he was forced to pay King, to-wit, the \$2,154.60, with interest from the time he paid it to King, to wit, 10th of November, 1866. We think there was, therefore, error in the instructions of the court as given and complained of in the seventh ground of the motion, "that the price paid by Beall to Rust on his purchase of the cotton was the measure of Rust's liability." We, therefore, order and adjudge that the defendant in error, on the return of the remitter in this case to the court below, do write off from the verdict and judgment recovered by him in the court below, against said Jeremiah Beall, the sum of thirteen hundred and ninety-nine dollars and thirty-five cents (the dfference between the respective sums of \$2,154.60 and \$755,25), with interest on the same from the 19th of November, 1866; and on his so writing off said sum with the interest aforesaid, that a new trial in said cause be refused, and the judgment affirmed. And it is further ordered, if said defendant in error fails or refuses to write off said sum as herein directed, with the interest thereon from the

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19th of November, 1866, then it is ordered that the judgment of the court below be reversed and a new trial granted.

Affirmed on terms.

## BUTLER vs. MOORE, executrix.

In an action by a purchaser of seed against his vendor on the latter's warranty of their quality, no fraud being alleged, the measure of damages would be the purchase money with interest and expenses incurred by the purchaser in complying with the contract after the same had been entered into, such as the hauling of the seed, preparing the purchaser's land for planting, sowing and rolling the seed, and such other necessary expense as was incurred after the making of the contract.

(a.) Loss of prospective profits on the land planted with the seed does not form a part of such damages.

Warranty. Contracts. Damages. Before Judge SNEAD. Richmond Superior Court. October Term, 1881.

Reported in the decison.

FOSTER & LAMAR, for plaintiff in error.

M. CUMMING, for defendant.

SPEER, Justice.

Plaintiff in error sued the testator of defendant for a breach of contract, upon a warranty made by him to plaintiff of certain German millet seed which plaintiff bought for the purpose of planting and raising a crop therefrom, which purpose was well known to defendant. He (defendant) at the time of said purchase warranted said seed to be good, and that the same would germinate and grow. Plaintiff alleges that he went to great expense, labor and care to prepare and fertilize his lands, and that with great care he planted the seed; but the same wholly failed to

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germinate or grow, and were worthless, by reason of which plaintiff lost his labor and money expended in preparing, plowing and rolling said land; also lost the rent of said land for the year and all the profits, etc., that he would have realized in the production of said crop. On special demurrer, the court ordered stricken from plaintiff's declaration so much thereof as claimed damages for the labor and money expended in preparing said land, for the rent of the same, or profits that the plaintiff would have realized by the production of said crop if said seed had germinated and grown, holding that the measure of damages plaintiff was entitled to recover was limited to the price paid for said seed and the interest thereon, and this is the error assigned and here for review.

It will be borne in mind that this is an action for damages arising on a breach of contract, not for a tort. Nor is there any allegation of fraud in the writ.

In actions for breach of contract, the law provides for the recovery of liquidated damages when the same are fixed by agreement.

Penalties in bonds are not recoverable if they appear unreasonable, and not so actually intended by the parties. In such cases the law usually gives only the actual damages. Code, §§2940, 2941.

Expenses of litigation are usually not recoverable as part of the damages on a breach of contract, unless defendant has acted in bad faith, or has been stubbornly litigious, or has caused plaintiff unnecessary trouble and expense. Code, §2942.

Exemplary damages can never be allowed in cases arising on contract. Damages recovered on covenants of warranty as to lands, as well as on bonds for titles, are also fixed by rule.

There is a provision of the Code touching the recovery of damages on a breach of contract as provided for in the 2944th section that has been the subject matter of discussion and interpretation, and which is usually relied Butler vs. Moore, executrix.

upon by those seeking to recover damages beyond what is ordinarily allowed on a breach of contract. The words of said section are: "Remote or consequential damages are not allowed whenever they cannot be traced solely to the breach of the contract, or unless they are capable of exact computation, such as the profits which are the immediate fruit of the contract, and are independent of any collateral enterprise entered into in contemplation of the contract."

Plaintiff insists on this breach of contract—that he is entitled to recover damages for the rent of his land, for his labor, money and care bestowed in preparing and fertilizing his land sown, and which proved unproductive by the worthlessness of the seed, and again for the value of the crops he would have raised on the land.

As early as I Kelly, 591, it was ruled in an action for breach of warranty on the soundness of a slave that the measure of damages was the difference between the price paid and the actual value of the slave with interest thereon. If the slave proved worthless and died, the measure of recovery at least was the price paid, with interest thereon. It was ruled later, in 19 Ga., 417, that any necessary expense which one of the contracting parties incurred in complying with his part of the agreement may be recovered for breach of the contract; but in the same case it was held prospective profits, which are conjectural, are usually too remote and uncertain to enter into the estimate of damages.

In 22 Ga., 269, it was held that evidence of loss of profits by the necessary suspension of iron works, in consequence of the failure of a common carrier to deliver coal, is inadmissible in an action against said carrier for failure to transport and deliver the coal under his contracts. This measure of recovery, as before stated, as to the purchase money and interest or the difference between the price paid and what it was worth in its diseased condition, and extraordinary expenses, such as medical attendance, etc.,

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was again recognized in 23 Ga., 17. In 41 Ga., the rule laid down in the 2944th section of the Code was followed as to remote or consequential damages. Yet, it was also held in the same case that any necessary expense incurred in complying with the contract may be recovered. See also 43 Ga., 411; Code, §2950. In 60 Ga., 148, money paid for a worthless fertilizer was held recoverable back, with interest; and also the cost of hauling said article to the place where it was used, was held to be recoverable.

In 56 Ga., 86, on a plea of partial failure of consideration to a contract given in the purchase of bacon, the rule recognized was, "the abatement of purchase money" (where the goods were sold under a warranty, either express or implied), "should be equal at least to the difference between the agreed price and actual value as reduced by defective quality."

In this suit no fraud was alleged nor any knowledge on the part of the seller that the seed were bad. It is merely a suit on the warranty of the merchantable quality of the goods, which the law imposes, or on the express warranty of the fitness of the seed for planting, as alleged by the plaintiff, and in such a suit we are constrained to hold, in conformity with the repeated rulings of this court, as referred to, that if the seed were worthless, the measure of damages would be the purchase money with interest and any expenses incurred in complying with the contract after the same was entered into, such as the hauling of the seed, preparing the lands for planting, sowing and rolling said seed, and such other necessary expense incurred after the entering into said contract.

We are well aware that a different rule, as to the measure of recovery, prevails in many of the other states of the Union, as was so ably and earnestly pressed upon this court by the counsel for plaintiff in error. It was insisted that the great public policy that should control an agricultural state should not lag behind her sister states, who have recognized a more liberal rule in favor of those engaged in

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cultivating the soil; and that such is the policy of many of the states is made manifest in the authorities produced and relied upon by counsel for plaintiff in error. 71 N.Y., 118 (27 Am., 19); 36 N. J., 262; 34 N, Y., 634; 13 Howard, 344; 19 Johns., 331; 35 Barb., 17; 8 Taunt., 535; 34 E. C. L., 628. It is insisted the states announcing the rule contended for are each commercial states, with the national bias of the courts in favor of the salesman as against the farmer, and so much stronger the necessity and reason for the same to be recognized by an agricultu-This is an argument that might ral state like our own. be well addressed to the law-making power, and not to this court, in view of the unbroken line of decisions made But, while we can not acquiesce or on this question. sanction the rule as to the full measure of damages as claimed by plaintiff in error, we think the court erred in limiting the plaintiff's recovery to the price paid for the seed with interest.

Judgment reversed.

## CLARK 25. THE STATE OF GEORGIA.

There must be some distinct assignment of error in a bill of exceptions before it can be considered by this court. If the language be so obscure or confused that no distinct assignment of error appears, the writ of error will be dismissed.

Practice in Supreme Court. At February Term, 1882.

Reported in the decision.

- E. G. SIMMONS; J. L. BLALOCK; J. W. BRADY, for plaintiff in error.
- C. B. HUDSON, solicitor general; W. A. HAWKINS; ALLEN FORT, for the state.

Russell vs. The State.

# JACKSON, Chief Justice.

The only attempt at an assignment of error in this bill of exceptions is couched in such language that we cannot well decipher its meaning. Certainly, it is not that clear and distinct assignment of error, or plain specification thereof, which the law demands. Code, §4251; I Kelley, 1; 38 Ga., 554. It is in the following words:

"As on the hearing of said motion the new trial then and there prayed for was denied and refused, the said Emma Clark plaintiff in error as appears of entry on said motion which is now assigned as error."

Whether the error was based on the time of the hearing of the motion, or on the grounds of the motion, on the entry on the motion, or what, we do not see from these words. Indeed, there appears to be a full stop after the word "now," and the words "assigned as error" seem to stand alone, and refer to all that precedes it, if to anything.

The assignment of errors must appear distinctly in the bill of exceptions; they must be plainly specified in it; and the transcript of the record cannot cure the defect. No assignment of error appears, or can appear there.

Writ of error dismissed.

## RUSSELL vs. THE STATE OF GEORGIA.

- 1. For a single juror, when a poll of the jury has been demanded, and eleven have answered that the verdict rendered is theirs, who has by inadvertence been overlooked until the jury have been discharged, to be called and polled before he has left the presence of the court or mingled with bystanders, is so slight an irregularity as not to call for the granting of a new trial.
- The question of intent with which an act was done is one for the jury, and when they have said that such intent was criminal, with some evidence to support their verdict, this court will not interfere-

Criminal Law. Practice in Superior Court. Jury. Intent. Before Judge HARRIS. Douglas Superior Court. July Term, 1881.

#### Russell vs. The State.

Reported in the decision.

M. M. SMITH; T. W. LATHAM, for plaintiff in error.

H. M. REID, solicitor general, for the state.

SPEER, Justice.

The plaintiff in error was indicted for the offence of larceny from the house, and on a trial on the same he was found guilty. A motion was made for a new trial, which was overruled, and excepted to.

The first and second grounds of the motion are the usual statutory grounds of the verdict being contrary to law and evidence. The third ground, and the one mainly relied upon here, was as follows:

When the judge had charged the jury, he directed them to retire and make up their verdict; they retired, and, after deliberation for some time, they returned into court with a verdict of guilty, signed by the foreman and read in open court. Counsel demanded that the jury should be polled. The judge directed the clerk to call the jury, when he propounded this question: "Is this or not your verdict?" to which each of the jurors answered affirmatively. The juror whose name was third on the list, to-wit, B. W. Johnson, was not called, nor was he polled. The court being on the eve of adjournment, the jurors were discharged for the term. The jury dispersed with the crowd, some of them had gone as far as the outer door of the court, when the attention of the court was called to the fact of the omission, by W. A. James, not of counsel. The court reassembled the jury, directed the clerk to call the name of the juror, B. W. Johnson, which was done, and the court asked of the juror, Johnson, this question: "Is this or not your verdict?" which being answered "yes," the verdict was recorded and defendant sentenced. Defendant assigned error: First, in . failing to poll the jury before their dismission and disRussell vs. The State.

charge. Second, in the question asked, and because the court allowed the juror, Johnson, to be recalled, after the jury had been discharged, and after they had dispersed for the term, and in receiving and allowing the verdict to be recorded, and in passing sentence and entering judgment thereon.

To this ground in the motion the judge appends the following, as a modification, as set forth in the motion: "The juror who was not called did not before he was polled leave the presence of the court—the jury were all present at the return of the verdict."

When the irregularity as to polling this jury was first presented in the argument for the plaintiff in error, speaking for myself, I was inclined to think that its effect in law was to vacate and woid the verdict received by the court and upon which the judgment was entered, but subsequent reflection and conference with my associates have led me to the conclusion with them that it is such a mere irregularity, if any, as could not possibly have affected the result of the verdict, and, therefore, worked no detriment to the prisoner. As to the form of the question propounded by the court to the jurors in the process of polling them, we see no such variance from that usually propounded as would be material. In substance the form as put by the court is not only recognized in the standard works on criminal procedure, but has been also pursued with the approval and sanction of this court. I Bishop's Crim. Procedure, sec. 1003; 31 Ga., 641; 62 Ib., 87; 64 Ib., 465. The question recognized in the authorities cited is in substance if not in identity such as was propounded by the court in the case at bar.

But the main question before this court, pressed with zeal and confidence by counsel for plaintiff in error, is the fact, as appears, that though a poll of the jury was demanded by the counsel of the defendant, all of the jury were not polled—that one name was omitted to be called by the clerk, and hence failed to respond, and that the

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jury having been discharged for the term and dispersed, the court had no authority to re-assemble them and conclude the polling. It appears from the record that by inadvertence only eleven jurors were called and responded to the poll, and the jury were then discharged; but on being informed of the inadvertence, the jury, who had not retired beyond the outer door of the court-room, were recalled (the juror not polled had remained in the presence of the court all the time), ordered to their box, and the inadvertence supplied by having the usual question put to the juror who had been overlooked, and on his answer being favorable to the verdict, it was ordered to be received and recorded.

We recognize fully the legal right of the defendant to demand the polling of the jury in all criminal cases, unless by his act or consent inconsistent with such right he has waived or surrendered it, and on demand made for the polling of a jury, the legality of such verdict is only completed by the poll. We further recognize it as true that when a jury has been discharged, and dispersed, and mingled with the crowd, it is too late to cure an omission to poll by re-assembling the jury for that purpose. 6 Ga., 458; 36 Ib., 380; 39 Ib., 719. The right to poll a jury is a legal one, and the refusal is error. 52 Ga., 478; 63 Ib., 306; 61 Ib., 401.

But, conceding these propositions to be true, has not the accused had his full legal rights accorded to him as to polling the jury, under the facts of this case? Here, eleven jurors are inquired of as to their consent to the verdict, and acquiesce therein by their answer. They are discharged, but before any had gone beyond the outer door, and while the juror, who had not been questioned, continued in the presence of the court, the retiring jurors who had already answered, were recalled, placed in the box and the omitted juror required to reply as the others had previously done, to the questions propounded. We cannot imagine how this mere inadvertence, so promptly corrected on be-

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ing discovered, could possibly have affected the result to the prisoner, but on the other hand, he had accorded to him substantially his right of polling, and thus verifying the verdict rendered. It is not to be understood that the enforcement of the criminal law is to be thwarted or evaded by mere slight irregularities in the procedures of courts if its forms have been substantially complied with, and it is apparent from the facts, that in these slight irregularities the defendant has been denied no legal right to a fair and impartial trial. The criminal law of our state has, in tenderness to the life and liberty of the citizen accused of crime, thrown around him every safeguard to secure him a public, speedy and impartial hearing, according to the forms of law, and when these have been substantially accorded him and none denied him, let him therewith be content to atone in its penalties for its infraction by him. We conclude that the ground complained of here scarce amounts to a slight irregularity—none such, at least, as in our opinion calls for correction on our part by awarding a new trial. We rest this judgment, affirming the judge below upon the distinct ground that the juror who had not been polled had remained in presence of the court unaffected by his discharge or his surroundings.

2. The main question, under the evidence in this case, was as to the intent with which the accused took the clothing of the owner, and which are made the subject matter of this indictment. Speaking for myself, I am not prepared to say I could have acquiesced in the verdict rendered, had I been in the jury box. But to judge of the intent with which men act when charged with crime, the law devolves that duty upon the jury, and as they saw the witnesses, heard their testimony and have passed upon that question, and their action has been reviewed by the judge presiding, and approved, we do not feel called upon to interfere. 45 Ga., 108; 22 Ib., 236; 58 Ib., 328.

Judgment affirmed.

## IVERSON et al. vs. SAULSBURY, RESPESS & Co.

[This case was argued at the last term, and the decision reserved.]

While a chancellor sitting at chambers, on full notice to all parties, may order a sale of trust property, he has no power to grant authority to a trustee to mortgage a trust estate, and a mortgage so given will not bind the *cestuis que trust*.

(a.) We do not decide that a court of chancery in term time might not grant authority to encumber a trust estate.

Trusts. Powers. Courts. Mortgages. Before Judge SIMMONS. Bibb Superior Court. April Term, 1881.

Reported in the decision.

LYON & GRESHAM, for plaintiffs in error.

HALL & SON, for defendants.

SPEER, Justice.

Benjamin V. Iverson, as trustee for Mrs. Juliet A. Iverson and her children, petitioned C. B. Cole, judge of the Macon circuit, stating that the income of the trust estate held by him for plaintiffs in error was inadequate to their support and maintenance, and it was necessary for him to raise means for their support and to preserve and protect the corpus of said estate, and the only way to do this was to negotiate a loan secured by mortgage on the house and lot, in the city of Macon, occupied by himself and family, and held by him as trustee. He, therefore. prayed for an order authorizing him to execute a mortgage upon the trust property specified to secure the payment of his note for the sum of \$1,725.co. On the 9th June, 1866, Judge Cole, at chambers, appointed George W. Hardie, guardian ad litem for James S. Iverson, a minor son. He accepted the appointment, and united in the petition to have said loan negotiated and mortgage

executed. On the 11th June, Juliet A. Iverson and said Hardie, guardian ad litem, consented to the petition, and asked that it be granted. It was then, and on their statements, that the order was granted by Judge Cole. On the same day, B. V. Iverson, as trustee for his wife, Juliet A., and her children, executed a mortgage deed to James E. Graybill, on city lots 5 and 6, in square 70, to secure the payment of a note by B. V. Iverson, as trustee, for the sum of \$1,725 00, payable six months after date. The mortgage was duly recorded, and payments made thereon to the amount of \$1,306.00.

James Graybill afterwards petitioned for the foreclosure of the mortgage on the property, in Bibb superior court, against B. V. Iverson, the trustee, who accepted service on the 'rule nisi. At April term, 1873, a rule absolute was allowed, foreclosing said mortgage for the sum of \$1,046.33, with interest. Subsequently the fi. fa. issued from the judgment of foreclosure was transferred to defendants in error, and levied on lot 6 in square 70 as part of the mortgaged premises, and advertised for sale.

Whereupon Juliet A. Iverson, and her son James S. Iverson, the only beneficiaries, filed their bill in Bibb superior court, alleging the property levied on was held under a deed from Samuel F. Dickerson, trustee, to B. V. Iverson, as trustee, for the sole and separate use of his wife. Juliet A., for life, with remainder to her children, which was but a reinvestment of money held by Benjamin V. Iverson, trustee, from the sale of a house and lot in Columbus, secured to the like uses by the will of James Smith, the father of said Juliet A, the said lot being the residence of said cestuis que trust, and the only home they had, and that the money received on said mortgage, by said Iverson was not applied to the uses or benefits of said trust, but was employed and put to his individual 'use, in farming on a plantation which he was carrying on on his own account, in Houston county. An injunction is asked for on the ground that B. V. Iverson, trustee, had as such.

no power to execute said mortgage; that it was not a charge on the property, but a mere nullity; that it was not properly foreclosed; no rule nisi as required by law; it was not signed by the court, or entered upon the minutes; cestuis que trust were not made parties on the proceeding to foreclose; the debt was not the debt of the trust estate, but of B. V. Iverson, individually; that the mortgage deed, debt, etc., were clouds upon complainants' title. The purpose was to remove said cloud, to quiet, protect and insure said title against the debt and mortgage fs. fa., and have them declared void and of no effect, and to have the defendants enjoined accordingly.

To this bill defendants demurred on the grounds:

- (1.) There was no equity in the bill.
  - (2.) That they had an adequate remedy at law.
- (3.) Because James Iverson has no interest in the subject matter, and is an improper party.
  - (4.) Because B. V. Iverson is not a party to said bill.
- (5.) Because Juliet Iverson has an interest in said property which she can mortgage, and she is estopped by the proceedings from disputing the validity of the mortgage.

The demurrer, on argument had, was sustained by the court, and complainants excepted, and assign the same as error.

. The main question involved and relied upon by counsel for plaintiffs in error, is that the judge at chambers had no authority to sanction or authorize the execution of this mortgage upon the trust property, but that the order is void.

He insists that this being a simple trust for the sole and separate use of the wife for life with remainder to the children in fee, and with no special powers to the trustee, he could neither make this mortgage so as to constitute a charge upon this trust, nor did the judge of the superior court at chambers have any authority under the statute to confer such power on the trustee. It is a general rule, that trustees are not authorized to create any lien

upon the trust estate, except such as are given by law. It is admitted that there is no special Code. §2335. power conferred upon the trustee under this deed to execute this mortgage, but defendants in error rest their authority for the execution of this mortgage deed alone upon the order of Judge Cole, granted at chambers with the consent of the cestuis que trust under the act of 1853-4. Before the act of 1853-4 it was held by this court in the case of Arrington vs. Cherry, 10 Ga., 429, that a judge at chambers has no power, upon petition, to order a sale of trust property. "Chancery jurisdiction is conferred," said the court," in this state upon the superior courts, and not upon the judges thereof." Subsequently to the rendering of this decision, which was pronounced in the year 1851, the legislature passed an act in 1853-54, which we find embodied in the Code, \$2327, in the following language: "A trustee, unless expressly authorized by the act creating the trust, or with the voluntary consent of all the beneficiaries, has no authority to sell or convey the corpus of the trust estate, but such sales must be by virtue of an order of the court of chancery upon a regular application to the same. Such application may be made to the judge in vacation on full notice to all the parties in interest. and the order for such sale may be granted at chambers, the proceedings to be recorded as above provided. on application for appointment of trustee."

By the acts of 1853-54-55-56, thus codified, it will be seen that the judge may at chambers, on full notice to all the parties at interest, or to use the words of the original act, 1853-54, pages 59 and 60, "where all parties in interest are represented and consenting and where there is no question of fact in dispute, the judges of the superior court are authorized to make and pass all orders and decrees in relation to the appointment and removal of trustees and the sale and division of trust or other property, or the investments of trusts or other funds."

Section 249 of the Code further declares, "said judges

cannot exercise any power out of term time except the authority is expressly granted, but they may, by order granted in term, render a judgment in vacation."

The power given by express statute to the judge in vacation acting as chancellor, seems under the act of 1853-4 to be limited to the appointment and removal of trustees, sale and division of trust or other property, or the investment of trusts or other funds. No authority is conferred upon him by order at chambers to charge a trust estate with liens or mortgages, and unless this power is conferred expressly he is forbidden to exercise such a power out of term time. We cannot see that the powers conferred on the judge under the acts recited gives any power to the judge at chambers to authorize a trustee to borrow money, make a mortgage, or create any change upon the trust estate.

The object of the act of 1853, seems to be to provide a speedy method for the appointment and removal of trustees, sale, division of trust property and investment of trust funds, and in this way in proper cases to benefit and promote the objects of the trust. This power thus conferred by statute is limited, and can be exercised only in the cases and mode prescribed by the legislature. Gray vs. Hart, 3 Sum., 339; 8 Howard, 441. We would not be understood as ruling that, on a proper case made, a court of chancery, which is the superior court sitting in term, would not have authority to charge a trust estate by a mortgage lien or allow the trustee to raise money on the same for the preservation or protection of the corpus of the estate, but we do not find any authority of that kind conferred by law on the judge at chambers under the act heretofore recited. It is insisted a power to sell necessarily includes the power to mortgage. But the Code provides that authority to act in chambér's must be expressly granted. A contrary doctrine was likewise declared in 16 Beav, 400; 38 Barb, 473; 10 Barb, 522. Perry on Trusts, sec. 768.

"So a simple power to sell will not authorize a partition." Hill on Trustees, 476; 11 Vesey, 467. "Trustees with power to sell cannot grant leases." Hill on Trustees, 476; 8 Simon, 217; 3 Day, 389.

These views, in favor of this construction, given to the act of 1853 and 1854, under which it is claimed the judge at chambers authorized the execution of this mortgage, are strengthened by the rulings of this court in the case of Milledge vs. Bryan, 49 Ga., 397, in which it was held that the judge at chambers had no power by virtue of this act to order the sale of property belonging to minors, unless it was held by them in trust or was within equity jurisdiction by reason of some pending litigation in a court of equity. A like decision sustaining the last was rendered also in the case of Knapp vs. Harris, 60 Ga., 399.

If the order granted by the judge at chambers was void for want of authority, it is as though the mortgage was executed by the trustee alone. There is no special power in the deed to this trustee that gives him any authority either to sell or mortgage. The Code, §2335, denies to trustees the authority to create any lien upon the trust estate, except such as are given by law, and in construing this provision of the Code in the case of Taylor & Co. vs. Clark, 56 Ga., 309, Judge Warner, in delivering the opinion of the court, said: "We are not aware of any law in this state that gives to a trustee authority to create a lien upon the property of the trust estate."

As to the demurrer made that B. V. Iverson was not made a party defendant, this can be easily remedied by amendment. We are of opinion that the judge, under our view of the law erred in sustaining the demurrer and dismissing complainant's bill.

Let the judgment below be reversed.

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# CRAWFORD, Justice, concurring.

I concur in the judgment pronounced in this case and for the seasons set out in the opinion of Justice Speer.

It is said, however, that this judgment is inconsistent with that pronounced in the case of Iverson, trustee, et al. vs. Saulsbury, trustee, et al., reported in the 65th Ga., 724. This may be so for some reasons not affecting my concurrence therein. My approval of that judgment was based chiefly upon the ground that the beneficiaries were estopped by their conduct from setting up their title against that of the Saulsburys. See head-note 7, and the opinion elaborating the same. Next, because the decree of the chancellor was upon a subject matter of which, and of persons over whom he had ample and unquestioned jurisdiction, as shown by head-note 5, in the same case, and the reasons given therefor in the opinion. If, then, he had such jurisdiction, his decree was final and conclusive as to all matters upon which that decree was rendered In the words of the justice pronouncing the judgment, "All other objections on pre-existing facts are concluded by that decree at chambers, just as completely as they would have been concluded by bill tried and decreed upon in open court."

The incumbrance, its character, its validity and every thing thereunto appertaining were pre-existing facts with which it was too late to deal, and which I thought was the true intent and meaning of the decision wherein it was held that they were all passed upon and concluded by the decree.

Whether the incumbrance was authorized or not by the approval of the chancellor at chambers, was a dead question after a sale had been decreed, the property sold in pursuance thereof, expensively improved under the very eyes of the cestui que trusts, and years had elapsed before the sale was attacked. That is not this case. Nor do the words "sell or convey" as used in section 2327 of

the Code mean, refer to, or include anything else than a sale of the *corpus* of the trust estate, for in the very sounding line it says "such sale must be by virtue of an order of the court of chancery."

JACKSON, Chief Justice, dissenting.

I dissent from the judgment of the majority of the court in this case.

The point has been decided virtually by a unanimous bench of this court directly in the teeth of the judgment now rendered. 65 Ga., 724. A lien precisely like this had been ordered by the chancellor at chambers to be placed on property in that case; and to pay that lien a sale of part of the property covered by it was directed to be made by the chancellor at chambers. If that lien were no lien at all, of course the court was wrong in having it paid. It was no lien, if neither the trustee could make it himself, which I do not dispute; nor the chancellor do it or authorize it done at chambers, which I do dispute. But my brethren hold that the chancellor could not at chambers authorize the trustee to make the mortgage, and therefore it is void.

If so, in the 65th Ga., 724, this court affirmed a decree to pay a void lien out of trust property, which decree was had, too, at chambers. It is clear that the court as then constituted did not think the lien void, and therefore did not think that it was perpetrating the absurdity of enforcing in equity a void thing, that is a wholly dead thing, and bringing it to life and having it made so lively as to be paid out of trust property.

It is remarkable, too, that the parties in the case of 65th Ga., 724, and the case before us now are substantially the same; that the lien was created on the same property in the two cases, and that authority was given by the same able and experienced and distinguished Judge Cole to: create the lien in both cases. "Stare decisis" is too

sound and vital a doctrine to all the interests of society to allow me to give my sanction to a departure from its application to any case, but where it is sought to nullify it in a case which springs out of the very same facts and attached to the same property, and affects the same litigants, it strikes me as going beyond all reason.

But if it were a new question, I should hold that the chancellor at chambers had power where the facts were not in dispute, as is the case here, to authorize the conveyance set out in this record, and precisely similar to that which this court directed to be paid in the case in 65th Ga., 724, the case of Iverson, trustee, et al., vs. Saulsbury, trustee, et al.

What is the statute? I refer to the case in the 65th, and the opinion there reported, for reference to all the sections of the Code which bear on the power of the chancellor to direct the sale of trust property at chambers. It seems to me, that on the principle that the greater includes the less, the power to order the sale would convey with it the power to convey with the right to redeem or to mortgage property. Otherwise whenever the trust estate became involved to support starving beneficiaries, the chancellor could not relieve it except by sale of the corpus, though the rental when due, or the crop when matured, could easily have satisfied a lien if the same judge could have authorized its creation without parting forever with the title. The position is that the general assembly meant to empower the chancellor at chambers to kill the trust estate, to destroy all the corpus, but in no event to preserve it by empowering the trustee to put a little lien thereon, when it was clear to his judicial mind that the mortgage would be satisfied by the income as soon as due and the entire corpus be saved.

Did the codifiers and the legislature do so absurd a thing? Certainly not, all reason would reply; and when we look at what they did as written and printed, it will

be seen that they did precisely what reason would lead us to conclude that they should have done.

Section 2327 of the Code is in these words:

"A trustee, unless expressly authorized by the act creating the trust, or with the voluntary consent of all the beneficiaries, has no authority to sell or convey the corpus of the trust estate, but such sales must be by virtue of an order of the court of chancery upon a regular application to the same. Such application may be made to the judge in vacation on full notice to all parties in interest, and the order for such sale may be granted at chambers, the proceedings to be recorded as above provided on application for appointment of trustees." It will be seen that the restriction is upon the trustee himself, neither to sell or convey, but the power is given to the chancellor to authorize the act, and then it may be done. that the section afterwards employs the words "such sales;" but the spirit of the act is undoubtedly the selling or conveying alluded to in the restrictive words above. Now, a mortgage is a conveyance; it is a deed, in some cases even in this state, in all cases elsewhere almost, it passes title, and the mortgagee enters and uses the fruits of possession until the debt is paid.

So that, if not from the words of the statute, from its reason and its spirit, the legislative mind is seen to be that without authority from the beneficiaries, or from the donor in the trust paper, a trustee cannot sell or convey any of the corpus of the trust estate, unless he shall procure authority to do so from another source of power, to-wit, a court of equity. There are but three modes known to our law by which he can sell or convey—in any sense of the latter word—any part of the corpus of an estate entrusted to his management. One is where it is so nominated in the terms of the trust deed or will by the creator of the trust; the second is where all the beneficiaries assent to it; and the third is where, the power not being in the deed or will, and the beneficiaries,



or some of them, withholding assent, the chancery powers of government are allowed to interpose and to grant the In cases where the terms of the trust do not give the power, and where any one beneficiary refuses assent, it is absolutely necessary from the wants of society and the vicissitudes incident to all human life and fortune. to vest authority somewhere for relief. Taxes must be paid, and the income may not pay them, from some disaster to the crop if in the country, or from fire if in a city. Shall the corpus be sold to pay them, and is the remedial power of the chancellor restricted to the sale alone? The fire damages, but does not destroy, the tenements in a city, and repairs are absolutely necessary, or stores remain untenantable and unrented. Must the valuable land and the tenement standing thereon be sold to raise money to repair, and is the chancellor confined to that mode of raising it, and may he not put, or authorize to be put, on that land and damaged tenement a lien to be paid when the repair is made and the stores again rented and the rent collected? If such be the law, it is a bad law and very disastrous to the corpus of trust estates. cases put they cannot be preserved at all, but must be sold and sacrificed in a damaged condition, and the proceeds of the sale at such sacrifice be reinvested at much ·loss to the corpus.

To preserve a trust estate, to supervise its management, to hold the trustee to the line of duty for the purpose of preserving its corpus for the benefit of the beneficiaries, is an elementary branch of equity jurisprudence; and yet it is now held that equity cannot preserve it by creating a lien or mortgage on it which it clearly sees the income will pay when due, but must sell it or part of it, whether divisible advantageously or not, to save the beneficiaries from want of the necessaries of life, or to preserve part of the corpus at a ruinous sacrifice of another portion thereof.

But it may be said that the judgment of the majority

of the court is not that equity cannot authorize the mortgage, but that the chancellor at chambers cannot do so. Such is not the statute, and it would be quite disastrous to trust estates if it were the law.

Shall parties wait six months or more for the regular term of court, and lose all this time, before repair and re-rent can be made, or is a court of equity always open for such purposes as these? I invoke again the statute law as testimony. By section 4221 of the Code it is enacted: "All proceedings exparte, or in the execution of the protective powers of chancery over trust estates, or the estate of the wards of chancery, may be presented to the court by petition only, and such other proceedings be had therein as the necessity of each cause shall demand."

By the next section, 4222, it is enacted: "A court of equity is always open, and hence the judge in vacation and at chambers, may receive and act upon such petitions, always transmitting the entire proceedings to the clerk to be entered on the minutes or other records of the court."

Thus it is manifest that our law does provide a speedy remedy in a court always open for the purpose, and before a judge at chambers with full power then and there to act on just such a petition as that on which chancellor Cole acted in this case for the preservation, as he adjudicated and concluded all issues thereon, of the trust estate and for the necessities of the cestuis que trust; and thus it appears that my venerable and distinguished friend knew what he was doing, and his jurisdictional power in law conferred by statute to do the act of authorizing the conveyance or mortgage deed which is the subject matter in litigation here.

In whom does the law repose chancery powers in a case like this? In the breast of an honest and incorruptible judge alone.

No jury is necessary; because none is provided for in that court of conscience which is "always open" in the language of section 4222 of the Code above cited. Juries

are only provided at the regular terms, and are only important under our system where facts are disputed; but in a case like this, where one beneficiary was of age and agreed to the facts, and the other was approaching his majority and appeared by guardian ad litem and also agreed to them, no jury was necessary. For authority to appoint the guardian ad litem in such a case, see section 1224, in the same chapter of the Code, where it is enacted: "If minors are interested, and they have no guardians, guardians ad litem must be appointed and notified before the cause proceeds."

The facts being all agreed to by both beneficiaries, I submit that the judge at chambers was just as competent and fully as able to decide the equitable principles applicable to those facts, as the same judge would have been had he been on the bench. In the one case he sat in a chair in his room and adjudicated and decreed; in the other he would have been on the bench, and there he would have adjudicated and decreed the same thing. cases the facts before him would have been identical; being the same man, his view of the law and equity applicable to them would be the same; and in both cases he alone would have acted. I see no reason but much injustice in reversing the judgment of Judge Simmons that this mortgage debt authorized by this open court at chambers ought to be paid by this trust property; and also seeing to my mind with equal clearness that the case of Iverson, trustee, et al. vs. Saulsbury, trustee, et al., 65 Ga., 724, virtually covers and controls this, I am left no alternative but, with entire respect for my colleagues, to dissent from their judgment, so that it may not be fixed as law beyond the power of a majority court to reverse it hereafter.

Gibbs vs. Brown.

#### GIBBS vs. BROWN.

Where a husband and parent are both claiming the custody of a minor wife, the discretion of the presiding judge in awarding the possession of her person will not be interfered with unless grossly abused.

(a.) The marriage of a female minor over fourteen years of age is valid, though the parents may not consent.

Husband and Wife. Parent and Child. Habeas Corpus. Before Judge SNEAD. Richmond Superior Court. October Term, 1881.

Reported in the decision.

F. H. MILLER; P. J. SULLIVAN, for plaintiff in error.

No appearance for defendant.

CRAWFORD, Justice.

Thomas Brown and Josephine Gibbs were married in October, 1881. Soon thereafter Anna Gibbs, the mother of Josephine, under a writ of habeas corpus, had the parties brought before his honor, Judge Snead, to obtain the custody of her daughter, whom she alleged to have been illegally detained under pretence of marriage, when she was under fourteen years of age, and which said pretended ceremony had taken place fraudulently and without her consent.

On hearing the facts of the case, the judge discharged the writ and the parties, thus awarding the custody of the said Josephine to her husband.

This judgment is the error assigned.

The testimony submitted to the judge was that a marriage of the parties under a proper license had been duly solemnized, though no consent of the mother appears to have been obtained authorizing the issuance of the license by the ordinary.

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The question of fact before the judge was whether the wife was under or above the age of fourteen years. He decided that she was over fourteen, and therefore the marriage was valid.

It is insisted that the judge in this decision committed an error of fact, in finding that the said Josephine was of sufficient age to contract marriage, and especially in the legal rules by which that finding was reached.

This court can only look to the finding itself; with the reasoning by which it was arrived at, we have nothing to do. There are but few, if any, issues that are entirely free from doubt, and the judge or the jury trying them may reach a conclusion by good or bad reasoning, but when reached it is not a matter of special inquiry if supported by sufficient proofs.

The judge found that the wife was fourteen years old, and being fourteen, that the marriage was legal and binding. This was not error. Code, §1695.

It is further urged that he committed an error of law in not awarding the control of the said Josephine to the mother, even though she may have been fourteen years of age, as there was no question but that she was under eighteen.

It is true that the parent is entitled to the custody and the service of a child during its minority; and so, too, is the husband entitled to the custody and the service of the wife; yet, whenever any dispute arises between the husband and wife, or parent and child, touching these matters, and the aid of the law is invoked by writ of kabeas corpus on account of the detention of either, it becomes the duty of the court, on hearing all the facts, to exercise its discretion and determine to whom the custody of such wife or child shall be given. Code, §4024. And in such cases it must be a flagrant abuse of that discretion which will authorize a reviewing court to interfere. 14 Ga., 657; 34 Ib., 258.

Where there is a conflict of rights, as in this case, be-

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tween the husband and parent, the power to settle it must be lodged somewhere, and we think it is wisely lodged in the judge, whose sound discretion under the facts of each case must decide into whose custody the party must go. To return the wife, though under eighteen years of age, to the parent, under all circumstances, might be grossly violative of every principle of right and justice. In some cases it might be wise to restore the wife to the parents, because of the great indiscretion in making a most ill-advised marriage, and whilst she may yet be returned to the paternal roof unknown of her husband, leaving her to a little sober reflection and the lapse of time to decide upon her future action.

In other cases it might be cruel and unjust to separate a wife from the father of her unborn child, and send her to her parents, however badly she may have acted in assuming her new relations without their consent.

Thus the law has confided, as we think, the question made by this record to the judge of the superior court under the facts of each case, to put the custody of the person detained with whomsoever he thinks best, and unless there is a flagrant abuse of his discretion, this court will not disturb it.

Judgment affirmed.

# BRYANT & LOCKETT vs. THE SOUTHWESTERN RAILROAD COMFANY.

- 1. The charge of the court should be applicable to the facts developed by the testimony.
- 2. Though a shipper of live-stock contracted with the transporting railroad that it was not to be responsible for attention, feeding or watering of the stock, but that it should afford the shipper reasonable facilities for those purposes, yet if the railroad carried the stock beyond the destination fixed by the bill of lading, and there detained them for several days before their return, it would not be relieved from liability for failure to care for the stock after passing the proper destination.

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- 3. When the Central Railroad received live stock at Atlanta to be transported to Americus over its road and that of the Southwestern Railroad, and by a mistake on the part of the first road, they were consigned to a point beyond Americus, and were so received and carried by the connecting road, such facts would not relieve the latter from damages occurring by reason of inattention to the stock at the place to which they were actually carried.
- 4. Though under the contract of shipment a railroad may have been liable only for damages arising from gross negligence in not attending to live stock, yet where it carried the stock beyond the agreed destination, and there kept them for a time, its liability as to such time was not limited to the results of gross negligence.

Railroads. Damages. Negligence. Contracts. Charge of Court. Before Judge Crisp. Sumter Superior Court. October Adjourned Term, 1881.

Reported in the decision.

HAWKINS & HAWKINS; B. P. HOLLIS, for plaintiffs in error.

S. C. ELAM, for defendant.

CRAWFORD, Justice.

Bryant & Lockett sued the Southwestern Railroad Company to recover damages for losses sustained upon a car-load of mules shipped from Atlanta to them at Americus. The allegations upon which they relied for recovery were: That the mules were delivered and received in good order by said railroad company at Macon, to be delivered in like good order to Lockett at Americus, on the 22d day of January, 1881. But, by the careless and negligent conduct of its agents and employés, said car-load of mules was sent to Dawson, forty miles beyond Americus, and kept there for three or four days without attention, watering or feeding, to their injury \$500.00. Other allegations of losses, arising from said negligence, were set forth and relied upon.

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The jury, under the evidence and charge of the court, returned a verdict for the defendant, which plaintiffs moved to set aside, but said motion was overruled, and they excepted.

The evidence material to a decision of the questions made by this bill of exceptions is, that the mules belonging to the plaintiffs were shipped in a car "billed" to Dawson, and consigned to one Thornton, whilst Thornton's, another lot shipped, were consigned to the plaintiffs at Americus. Thus, the mules belonging to the plaintiffs were carried beyond their destination, which they passed on Sunday, and where they should have been delivered, but being shipped to Dawson, were so forwarded, and remained in the car from the time on Sunday when they should have been unloaded, until Tuesday at 12 o'clock, without attention, water or food. They were so damaged by standing up on the cars so long, without being fed or watered, and became so stiff that some of them were almost wholly lost, and the rest were injured \$20.00 a head. Other proof of losses was also introduced.

The defendant introduced in evidence a "live-stock contract," by which it was agreed that the shipper should release the railroad company from liability for all injury, loss or damage arising from the character of the freight, and from all other damages which shall not have been caused by the fraud or gross negligence of the company. Other stipulations were also incorporated in this contract, but nothing material to be added, which affects the rights of the parties after the mules were carried beyond the place of delivery.

It further appears that the mules were taken out of the cars at Macon *en route*, watered and fed, and then reloaded and received by the Southwestern Railroad Company.

No evidence was submitted controverting the facts that they were carried to Dawson; that they were without water, food or change, from the time they were received on Sunday at Macon until delivered at Americus, TuesBryant & Lockett vs. The Southwestern Railroad Company.

day at 12 o'clock, or that the losses set up were not true.

The judge charged the jury among other things, as follows: "In the contract between Bryant & Lockett and the Central Railroad Company, it is especially stipulated that they, nor the road receiving that property from them, shall not be liable for any attention, feeding or watering the stock, but that they should offer reasonable facilities to the shipper or person in charge of the stock. The railroad company merely undertook to offer or afford them facilities for feeding and watering the stock, not to feed and water them itself. They expressly stipulated that the shipper shall not hold them responsible for any delay occurring in the delivery of the property, but that the shipper shall attend to the stock and feed and water them. Therefore the Southwestern Railroad Company is not liable for any injury that occurred to those mules for want of being fed and watered, for people are bound by their contracts, by the contracts which they may make. They can make any contract that they choose, but after it is made they are bound by it."

"If you should believe from the evidence that the car load of mules, Mr. Lockett's car load, was, by mistake of a person in Atlanta, connected with the Central Railroad Company, shipped to a party in Dawson and not to Lockett in Americus, and the Southwestern Railroad received these mules in Macon so consigned to a person in Dawson, and not to Lockett in Americus, and carried them down to Dawson, to the place where they were consigned by the way bill, and that whatever damage or injury they sustained, occurred at that point by reason of their being shipped to that point, and not being fed and watered there, why then, in my judgment, the Southwestern Railroad Company is not liable for such damages."

1, 2. The first paragraph of the foregoing charge would be correct if the railroad company had carried out its contract by a delivery of the mules at Americus as it agreed Bryant & Lockett vs. The Southwestern Railroad Company.

to do, and had not shipped them beyond. The plaintiff's contract extended to the taking care, feeding and watering the mules only to the place of their destination; and had the delay occurred, and the damage been sustained before reaching it, just as it did afterwards, then the plaintiff could not have complained.

He had the right to expect according to his contract that his mules would be stopped and delivered at the place of their consignment, and therefore was not bound to follow them to Dawson and feed and water, and care for them there.

The judge truly stated the law in instructing the jury that people were bound by their contracts, and our construction of this contract is that the Central Railroad and its connecting lines were to transport this live stock to Americus and no further; if they did, and damage accrued to the owners thereby, they were liable to respond.

- 3. The objection to the second paragraph of the foregoing charge is, that it relieved and discharged the Southwestern Railroad Company from liability on the contract agreed upon by the Central Railroad for itself and the Southwestern, to transport and deliver to the owners at Americus this car load of mules, and which it undertook to execute but failed to perform. And although a mistake at Atlanta may have been made by an agent of the Central Railroad in shipping these mules improperly, vet such mistake would not relieve the Southwestern Railroad Company from liability, under the facts as shown by the record in this case. It was a party to the contract. When therefore, it broke its contract by passing Americus and carrying to Dawson the plaintiffs' mules, they were entitled to recover for such breach of the contract, and for all damages consequent thereon, whether the same resulted from the failure to feed or water the mules, or to make sale of them, or any other cause flowing directly therefrom.
  - 4. Another assignment of error arises on the failure of

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the judge to charge that if the defendant had the mules in its possession, and while in its possession they were injured by the gross negligence of the agents and employés of said company in not feeding and watering them, then the defendant would be liable to the owners for such damage.

The plaintiffs were not entitled to this charge, as the gross negligence was confined to the watering and feeding generally, and not to the time whilst they were beyond Americus. Plaintiffs themselves were required to give this attention to Americus, but when the mules were shipped beyond that point they had not undertaken to follow them wheresoever the company might carry them and continue such attention. If then, after thus breaking the contract, they were damaged by such neglect, the defendant would be liable and the plaintiffs were entitled to such charge so limited, but not so general as claimed.

Judgment reversed.

#### ARNOLD vs. GULLATT.

Since the act of 1880, the law applicable to judgments against garnishess in justices' courts is similar to that applicable to other courts. A final judgment against the defendant is a condition precedent to a judgment against the garnishes; and if before such final judgment is obtained the garnishes appear and answer, he will be in time to prevent a judgment against him by default. Code, §3304.

Garnishments. Justice Courts. Before Judge HILLYER. Fulton Superior Court. October Term, 1881.

Reported in the decision.

FRANK A. ARNOLD, in *propria persona*, for plaintiff in error.

W. T. MOYERS, for defendant.

Arnold vs. Gullatt.

# CRAWFORD, Justice.

F. A. Arnold, having a suit pending in a justice's court against James E. Gullatt, sued out a summons of garnishment against George R. Meneely & Co., and served them by serving A. B. Bostwick, superintendent. Both suits were returnable to the June term, 1881, of the court, at which time judgment was rendered against Gullatt for the amount of his debt, and against the garnishee by default for the same sum. The defendant appeared and entered an appeal. At the July term of the said justice's court, A. B. Bostwick appeared and filed his answer to the summons of garnishment, admitting indebtedness to Gullatt in the sum of \$3.00, for his daily wages.

At this same term of the court Gullatt filed his affidavit setting up the same fact, and moved the court for that reason to dismiss the garnishment. Notice of this motion was served on Arnold, and both cases came on to be served at the August term next thereafter, when a jury returned a verdict for the plaintiff on the principal suit, and then the court gave judgment against the garnishees, upon the ground of the original default of the said garnishees in not answering at the first term of the said court.

The case was carried to the superior court by certiorari, and upon the hearing thereof the judge ordered that the judgment against the garnishees be set aside and a new trial had, and if the fund held by the garnishees be due defendant for wages, then the garnishees to be discharged, but if the same be not for wages then they are to be held liable.

The real question in this case is, whether the J. P., under the facts as set out in his answer, should at the August term of his court—that being the term at which final judgment was obtained against the principal defendant—have entered up a judgment against the garnishees, notwithstanding the answer of Bostwick, which had been filed at a preceding term of the court and stood untrav-

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ersed before him. A condition precedent, absolute and universal, in my opinion, to a judgment against a garnishee is a judgment final and conclusive against the principal defendant. When the plaintiff has thus established his claim by such a judgment, then, and not before, has he any right to ask for a judgment against the garnishee.

In this case there was a judgment against the principal debtor, but it had been vacated and set aside by appeal, and before final judgment on that suit the answer of Bostwick was filed denying any indebtedness except for the daily wages of the defendant.

But it is said that the original judgment by default against the garnishees was absolutely final, although none had been obtained against the principal; and this because there was no answer by the garnishee at the first term of the court. To rule such doctrine, would be to hold that one who is not a judgment creditor may nevertheless have a judgment against a garnishee for an unestablished claim against his simple contract debtor.

The cases cited by counsel for plaintiff in error in 55th Ga., 410, and 64 Ib., 608, do not contravene this principle, for in both cases this court only held that judgment might be had at the term provided by law, whenever at such term there was a judgment obtained against the principal defendant.

Neither is this case within that in the 64th Ga., 608; because in that case the question was, whether the garnishee should answer in ten days from the summons, or at the first term. The law requiring him to answer within ten days had not then been changed by the act of December 6th, 1880, and this court held, as it was obliged to hold, that the answer at the term after the lapse of ten days was illegal, and as a final judgment had been rendered against the principal debtor, judgment was properly entered against the garnishee for default in not making answer in ten days. But the effect of the act of 1880, supra is to restore the old law of answering at term, with

#### Arnold vs. Gullatt.

all its incidents, among which is the right to continue to the second term under the general law applicable to all garnishments in all courts. Code, §3304; acts 1855-6, section 15, page 29.

So the case in the 64th being out of the way, the case at bar falls within the general law, and the party garnished was in time with his answer, and, therefore, the court was right in sustaining the *certiorari* and granting a new trial.

Even if the reasoning in the 64th were applicable to this case, we do not think that it should be extended. now that the justice's courts are held like other courts at regular terms. It should cease with the law which made the trial of cases before justices of the peace come off when and where they pleased after certain notices. Besides, the real trouble in the case in the 64th was an informality in the summons, being a mere note at the bottom of the summons requiring answer in ten days, and it was held that the law fixed the time of answer, and not the summons. That being the case of a judgment creditor, and a case in a justice's court when there were no terms fixed by law for holding them, this case is not within it. Now, in justice's courts the same time for answer before final judgment against garnishees should be as in other courts.

It is true, that the act of 1880 is in the language of that of 1873, codified in section 4161, and if we gave it a literal construction, it would require the ruling in the 64th to be applied to this case, but we think that the act of 1880 was mainly to carry into effect the constitution of 1877, and to put back the justice's courts where they stood before the constitution of 1868 and the laws passed under it so far as respects answers in garnishments.

Judgment affirmed.

Gordon vs. The State-Tucker vs. Ball, administratria, and vice versa.

## \*GORDON, vs. THE STATE OF GEORGIA.

- The verdict in this case is supported by the evidence; and the charge of the court is in accordance with law.
- .2. There was no sufficient evidence in this case to show an agreement to fight between the defendant and the person alleged to have been assaulted; and therefore a refusal to charge on that point was right.
- 3. Where a defendant in a criminal case voluntarily exhibited a scar on his head to sustain his defense, there was no error in requiring him to allow it afterwards to be examined by a physician who was put on the stand in rebuttal by counsel for the state.

# JACKSON, Chief Justice.

[The following will explain the third head note: Gordon was indicted for an assault with intent to murder, committed on one Green. In the prisoner's statement he claimed that an improper intimacy had existed between his wife and Green; that upon his interfering between them, the latter made an assault upon him, in which his wife took part, and struck him upon the head with a heavy bar, used for closing a door, making a scar. The defendant then voluntarily exhibited the scar on his head to the jury. At the close of the statement, the court, over objection of defendant's counsel, allowed a physician to examine the scar and testify that in his opinion it was the result of an old wound and not of a recent blow.]

# TUCKER vs. BALL, administratrix, and vice versa.

- I. Where suit was brought on a contract, and the evidence for the plaintiff showed that a novation had been made, a new contract substituted for the original one and a new party introduced, a nonsuit was properly awarded.
- 2. A recovery could not be had by amending the declaration so as to include the new contract, and relying thereon.

<sup>\*</sup>No full reports or opinions are published in the following cases, under the provisions of the act of March 2, 1875. (R.)

Usry or. Phillips.

3. When the unsuccessful party in the court below brings the case to this court, and the successful party files a cross bill of exceptions, complaining of rulings adverse to him, if a reversal of the judgment of the court below is ordered, the questions made in the cross bill will be decided; if the judgment below is affirmed, a decision thereon is unnecessary.

SPEER, Justice.

The original declaration in this case was by Mrs. Tucker against the administrator of M. C. Ball, to recover an amount due by said Ball to her under a contract between Ball and the father of plaintiff, by which Ball agreed to support plaintiff during her life. On the trial, plaintiff introduced in evidence to support her declaration the answer of Ball to a bill in equity, in which he admitted the contract, and also alleged that since its making plaintiff had married one Tucker; that he agreed with Tucker and his wife to give them a certain amount of property in lieu of the support due plaintiff, and Tucker agreed to waive his marital rights and settle on plaintiff and her children the property coming to him through her. There was other testimony not material. Plaintiff sought to cover the variance between her declaration and proof by amendment. The court granted a non-suit.]

#### USRY vs. PHILLIPS.

Where the movant in a motion for new trial departs from the strict law, and enters into a consent order to file a brief of evidence within thirty days and to have the motion heard at a specified time in vacation, time is of the essence of the contract. To file a brief neither agreed upon nor approved is not a compliance with the order; and upon the call of such motion for hearing, it will be dismissed on motion. 49 Rule of Court; Pease vs. Pease, September Term. 1881.

SPEER, Justice.

[A verdict was rendered for the plaintiff, and defendant moved for a new trial. He took an order "that the deWilliams vs. The City Council of West Point.

fendant be allowed thirty days to file a brief of evidence with the clerk of the court, and the same be heard at Warren superior court." A brief of evidence was filed within thirty days. When the motion for new trial was called for a hearing, on motion it was dismissed on this ground, and error was alleged thereon.]

### WILLIAMS vs. THE CITY COUNCIL OF WEST POINT.

- A municipal corporation may bind itself by, and cannot abrogate, any contract which it has the right to make under its charter, but one council cannot, by ordinance, bind itself and its successors to a given line of policy, or prevent free legislation by them in matters of municipal government. Therefore, an ordinance that no license to retail liquor should be granted for less than \$500.00 per annum until the expiration of those for which that sum was paid, was void.
- (a.) One who paid \$500.00 for a license was entitled to exercise the rights and privileges conferred thereby; but upon the price of a license being lowered before he had made actual use of the one so issued, he could not repudiate it and recover the amount paid for it. 64 Ga., 199; 6 Wheat., 593.

# SPEER, Justice.

[On September 8th, 1879, the city council of West Point fixed the price of a retail liquor license at \$500.00. On January 5th, 1880, they passed an ordinance that "the city council of West Point shall not pass any ordinance or make any contract that shall impair or infringe on the rights or interests of any person who may take out license to retail liquors under said ordinance, passed September 8th, 1879," and that no license should be issued at a less price than \$500.00 per annum until the expiration of licenses issued under the previous ordinance. On January 10th, plaintiff obtained a license, and paid \$500.00 therefor. Two days later, and before he had used his license, the city counsel—which appears to have succeeded that passing the above stated ordinances—reduced

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the price of retail licenses to \$100.00 per annum, and proceeded to issue them at that price. Plaintiff thereupon sued to recover the \$500.00 paid by him. On demurrer, the case was dismissed, and he excepted.]

#### CARTER vs. PINCKARD.

- I. To constitute one a bona fide purchaser for value and without notice, so as to hold a title obtained by his grantor by fraud, he must not only have had no notice, but must also have paid the purchase money.
- (a.) To raise the question of protecting him to the extent of a portion of the purchase money which he has paid before notice, there must be appropriate pleadings.
- 2. A deed obtained by fraud and misrepresentation conveys no valid title to the grantee; and a deed from such grantee to a purchaser with notice, whether the purchase money be paid or not, gives such purchaser no title upon which he can recover the possession of the land from the original grantor.
- 3. The verdict is supported by the evidence.

# CRAWFORD, Justice.

[Carter brought ejectment against Mrs. Pinkard. She pleaded that she had been induced to make a deed to W. T. Pinkard by fraud, and that Carter had bought from him with notice of the fraud. It appeared, among other things, that Carter had paid W. T. Pinkard \$100.00 and given a note for the balance of the purchase money, not to be paid until he obtained possession of the land. The jury found for the defendant. In argument in the supreme court, it was urged that the \$100.00 paid by Carter should be allowed him, but no such claim was shown to have been made in the court below.]

The Western & Atlantic Railroad Company vs. McCauley-Paschal vs. The State.

# THE WESTERN AND ATLANTIC RAILROAD COMPANY 25. McCauley.

- 1. The verdict is supported by the evidence.
- 2. In fixing the amount of damages under a suit for destroying property, interest is not recoverable eo nomine, but the jury may consider the length of time damages have been withheld, the character of the tort, the conduct of the defendant, and all the circumstances of the transaction, and may, in their discretion, increase the amount of the damages allowed accordingly. 66 Ga., 499; 6 Am. Dec., 196; cit. and notes; 1 Am. Lead. Cas., 511, and notes.

## CRAWFORD, Justice.

[This was a suit against a railroad for killing a bull. The court charged that, in case the jury found for the plaintiff, they should give him the value of the bull at the time of the killing, and that they might give legal interest thereon from the date of the killing to the trial, not as interest, but as damages, adding it to the principal, and making a verdict for the aggregate amount.]

#### PASCHAL VS. THE STATE OF GEORGIA.

Where an indictment charged the commission of an assault with intent to commit murder by using a weapon likely to produce death, the proof must show that such was the character of the weapon. This may be done by producing the instrument itself, or showing the effect of it, or other satisfactory evidence, but must be done in some way. Code, §4359; 57 Ga., 107; 59 Ib., 638; 32 Ib., 672; 50 Ib., 591.

# JACKSON, Chief Justice.

[Allen Paschal was indicted for assault with intent to murder, "with a certain stick, loaded at the end with lead, said stick being a weapon likely to produce death." On the trial, the only evidence as to the nature of the weapon used by defendant was as follows: One witness testified

#### Wiggins vs. Henson.

that he had seen defendant some three years ago with a stick which was loaded with lead. Another testified, that in the act of striking, "the head of the stick shined like a silver dollar," the alleged assault having been committed on a "star-light night." A witness for the defence testified that the defendant was accustomed to walking with an ordinary hickory stick, weighing not more than a pound. Defendant admitted the fact of striking with a stick, but pleaded not guilty to the offence as charged in the indictment.

Counsel for the defence requested the court to charge the jury that "where the indictment charges the defendant with the offence of assault with intent to murder by using a stick, an instrument likely to produce death, then it is incumbent on the state to prove the allegations." The request was refused; defendant was found guilty, and excepted.]

## WIGGINS vs. HENSON.

The identification by a witness of a person or thing is necessarily a matter of judgment or opinion, and when accompanied with the facts on which it is founded, it is always admissible. 10 Ga., 529; 17 Ib., 134; 59 Ib., 483; Best on Ev., vol. 2, sec. 517, (2); I Greenleaf Ev., sec. 440; 13 Jur. R., 542.

# CRAWFORD, Justice.

[In an action of trover for cotton, the plaintiff testified that a bale of cotton was taken from his yard on Sunday night, was carried to the mouth of a lane, two hoops were broken from it and a portion of the cotton was carried away; that the bale was easily traced from where it was taken to where it was found; that the cotton sued for was found in a gin-house; that the witness believed it was his, because the defendant admitted having carried it to the gin-house on Monday morning; because, it was wet,

Wynn, administrator, vs. Wynn-Beall vs The State.

nappy, had stains of mud and manure upon it; all of which corresponded with the condition of the bale from which plaintiff's cotton was taken; also, because the weight of the cotton agreed with the number of pounds missed from the bale, and because the cotton was in layers. The admissibility of this testimony to identify the cotton was the point in contest.

### WYNN, administrator, vs. WYNN.

- The title to personalty cannot be determined on the trial of a possessory warrant therefor. 62 Ga., 412.
- 2. If the judgment of the court below be right, it will be affirmed, though a wrong reason may have been assigned therefor.

JACKSON, Chief Justice.

[Wynn, administrator, sued out a possessory warrant against Mattie Wynn, to recover certain personalty held by her. The only real issue was whether the property belonged to her or to the estate. The case was submitted to the judge without a jury. He decided in favor of defendant, and dismissed the warrant. This was the error assigned.]

## BEALL vs. THE STATE OF GEORGIA.

- The verdict in this case is not contrary to the evidence. The jury may make reasonable inferences from the facts proved. 56 Ga., 294.
- 2. When things attached to the realty are detached therefrom, they at once become personalty, and are the subject matter of larceny, even by the person so detaching them. Code, §§4407, 2220.
- 3. The difference between simple larceny and one form of trespass is that the former is the wrongful and fraudulent taking and carrying away of the personal goods of another with intent to steal the same; the latter is the taking and carrying away of the personal goods or property of another without his consent.



Bullard vs. Long et u.x.-Stripling vs. Holton.

## CRAWFORD, Justice.

[The subject of the larceny in this case was ears of corn taken from the field of the prosecutor by the defendant.]

#### BULLARD vs. LONG et ux.

[This case was argued at the last term, and the decision reserved. Jackson, Chief Justice, being disqualified, Judge Hillyrr, of the Atlanta circuit, was designated to preside in his stead.]

- 1. A deed made as part of a usurious contract, though void as title, may yet in equity be treated as a mortgage, and the lien enforced for amount legally due; no question as to registry or any intervening equity being involved.
- 2. Where money was loaned ostensibly for the purpose of removing an incumbrance on a homestead, and the question was whether the lender had notice that a part of the loan was directed to another and different purpose, and on the trial the only evidence to the point was the borrower testified that he told the lender what he wanted with the money, and how much, and that the lender replied he did not care for that, "all he wanted was his papers fixed as he wanted them;" and the lender himself testified that the money was to pay the incumbrance and "other part of it for something else," such lender is charged with notice, and he cannot enforce against the homestead so much of the loan as was thus directed. And a verdict finding the contrary was properly set aside on motion.

HILLYER, Judge.

## STRIPLING vs. HOLTON.

Parol evidence is inadmissible to add conditions to a written contract absolute on its face. 40 Ga., 199; 56 Ib., 31; 57 Ib., 350; 60 Ib., 157, 614; Code, §1950, par. 2.

SPEER, Justice.

Lumpkin vs. Respess, for use-Crawford vs. The State; etc.

## LUMPKIN vs. RESPESS, for use.

- 1. The verdict is supported by the evidence.
- A continuance was properly refused on the ground that a material witness was absent, when there was no evidence of his having been subpoenaed.
- A new and distinct party cannot be added to a suit by amendment. Code, §3480.
- 4. Where a party to a suit has ample opportunity to inform the court of his sickness and obtain a continuance, after verdict in his absence, a new trial will not be granted on the ground that he was sick, and—not expecting the case to be tried—did not send any affidavit of his sickness 51 Ga., 241; 53 Ib., 149; 54 Ib., 660; 59 Ib., 83.

SPEER, Justice.

#### CRAWFORD vs. THE STATE OF GEORGIA.

I. Where an indictment charged a defendant with "breaking and entering the depot of the Savannah, Florida and Western railway, a corporation chartered by said state, doing business under said name," the allegation that the owner was a corporation chartered by said state was mere surplusage and need not be proved. I Bish. Crim. Proc., §§234-5; 3 McLean, 333; 5 T. Rep., 311; 50 Ga., 591.

2. The verdict is supported by the evidence.

SPEER, Justice.

## MILLER vs. MEDLOCK.

Where one has a line between her own land and that of another run and marked by processioners and the county surveyor, if she is dissatisfied, she may appeal. The applicant is included in a reasonable construction of the terms "adjoining land owners" as used in §2390 of the Code.

SPEER, Justice.

The Etowah Manufacturing and Mining Company et al ; etc.

# THE ETOWAH MANUFACTURING AND MINING COMPANY vs. Dobbins & Company et al.

- I. The harsh remedy of injunction will only be granted when necessary to protect some right or interest of the party complaining which would otherwise be seriously injured or impaired. High on Inj., §§9, 10 and citations.
- 2. If a suit be proceeding without service, no legal judgment can be rendered, and injunction is not necessary against it.
- 3. That an agent without authority made promissory notes for his, principal and the holder took them with notice of such want of authority, can be urged in defence to an action on the notes without an injunction to stay the suit.
- 4. If promissory notes have been discharged by substituting another note in their place, this does not require an injunction to restrain a suit on such notes.

CRAWFORD, Justice.

### BAILEY et al. vs. BAILEY et al.

The principal involved in this case is covered by the ruling in Bailey et al. vs. Ross, administrator, et al., decided at the February term, 1881, of this court (pam. page 15.) Under that decision the cross bill in this case was without equity, and should have been dismissed.

SPEER, Justice.

# McAfee vs. The State of Georgia.

Possession of stolen goods shortly after the commission of a larceny, if unexplained and unaccounted for, will furnish a basis for a verdict of guilty against the person so found in possession. The nearer the possession to the time of the larceny, the stronger will be the inference of guilt; and the question of the result of the lapse of time is for the jury. I Gr. Ev., §§31, 34; Ros. Cr. Ev., 19 (Ed. 1874;] 53 Ga., 143; 58 Ib., 602.

SPEER, Justice.

Wellborn, administrator, vs. Hood-Jesting vs. The State; etc.

## WELLBORN, administrator, vs. HOOD.

- There was no error in this case which demands the grant of a new trial.
- 2. Where, during the term of a lease the landlord died, and at the expiration thereof the tenant moved from the premises, and in good faith abandoned possession, and another then took possession as owner, that the tenant some time thereafter rented from him and re-took possession as his tenant did not again render him a tenant of the original landlord or his representative.

SPEER, Justice.

## JESTING vs. THE STATE OF GEORGIA.

- I. While in a prosecution for an assault with intent to rape, statements of the female assaulted several hours after the transaction, would not ordinarily be admissible, yet where the defendant came up to the girl assaulted while the statements were being made, and upon being informed of them admitted their truthfulness, such statements were admissible in evidence.
- 2. The verdict is supported by the evidence.

SPEER, Justice.

# THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY vs. Cureton & Pearce.

- A letter from the agent of a railroad to certain shippers contained the following statement of rates: "The rate on iron from Rising Fawn to Chattanooga shall be six dollars to Chattanooga, and five dollars to any point on or beyond the Nashville, Chattanooga and St. Louis railroad per car load of 2,268 pounds:"
- Held, that the reasonable construction of this contract was that the rate should be six dollars per car load when shipped from Rising Fawn only to Chattanooga, and five dollars when shipped to any point beyond Chattanooga. The low rate did not apply to iron shipped at Chattanooga.
- (a.) The verdict is contrary to the charge of the court.



Johnson vs. Jones et al. -- Bosworth et al. vs. West; etc.

## JOHNSON vs. JONES et al.

- A verdict in an ejectment case that "we, the jury find for the plaintiff," is, in effect, a finding in favor of the plaintiff for the premises in dispute, and the property being sufficiently described in the declaration, the verdict is not void for uncertainty. 17 Ga., 340.
- 2. Prior lawful possession of land alone is sufficient to support an action of ejectment against a mere intruder who takes possession by force, and who shows no better title. Code, §3014.

SPEER, Justice.

## BOSWORTH et al. vs. WEST.

Suit was brought against three persons as partners on notes executed by one of them. All three were served. The existence of the partnership was contested, but the evidence showed that if there was a partnership all three defendants were members; the verdict was against two, omitting the defendant who made the notes sued on.

Held, that it was contrary to the evidence.

JACKSON, Chief Justice.

## REESE et al., for use, vs. KIRBY.

- The finding of the judge, presiding without a jury, was supported by the evidence.
- 2. Where a suit had been pending in court for over ten years without process, and no plea had been filed, or defence made by the defendant, it was proper to refuse to allow process to be attached and to grant time to perfect service. Code, §3490; 67 Ga., 576.
- 3. Where a rule nisi to establish a lost note is answered, and a defence made thereto, such appearance and pleading by the defendant in that proceeding will not cure the failure to attach process to a suit on the note sought to be established. The proceedings are different, and a defence to one does not waive process to the other.

Evans vs. The State-Gunn vs. McMichael, administratrix; etc.

#### EVANS US. THE STATE OF GEORGIA.

[This case was argued at the last term, and the decision reserved ]

- The substantial grounds of error in this case are governed by the ruling in Wilson vs. The State, decided at the present term.
- The act of 1877 (acts 1877, page 112) on the subject of lotteries and schemes for hazarding money, is not unconstitutional as containing more than one subject matter, or matter different from the caption.
- 3. The verdict is supported by the evidence.

CRAWFORD, Justice.

## GUNN vs. MCMICHAEL, administratrix.

- 1. The record showed an acknowledgment of service twenty days before the term of the court to which the case was made returnable; it appeared on the dockets in its regular order at the appearance and trial terms, as well as on the minutes; there was a confession of judgment at the proper term. No entry of filing appeared on the back of the declaration. Execution issued, was levied, and a claim interposed:
- Held, that on the trial of the claim case the fi. fa. was not rendered inadmissible for want of the entry of filing on the declaration. After acknowledgment of service and confession of judgment, it is too late to raise such objection. 25 Ga., 646.
- (a.) The suit appearing from the records was notice to third parties.
- 2. In a claim case if the fi. fa. be rejected from evidence on account of an irregularity, the levy should be dismissed. It is error in such a case to allow a verdict to be taken by the claimant.

CRAWFORD, Justice.

## CARTER US. THE STATE OF GEORGIA.

- An indictment for retailing liquor without a license need not charge to whom the liquor was sold. 16 Ga., 467-8; 25 Ib., 474-6.
- 2. The verdict was not contrary to law or the evidence.

Day vs. The State-Stanford vs. Treadwell et al.; etc.

## DAY vs. THE STATE OF GEORGIA.

The venue, like other facts, must be proved in a criminal case. Where there is no proof of venue, the verdict is contrary to law.

(a.) Ought not the failure to prove the venue to be made a distinct ground of the motion for new trial, instead of being included in the general ground that the verdict is contrary to law and evidence? Quare.

CRAWFORD, Justice.

## STANFORD vs. TREADWELL et al.

- 1. Where a case pending in court was, by agreement, referred to arbitrators, an award rendered, exceptions of law and fact filed, and the award set aside on an exception of law, as being void for uncertainty, the case still remains pending, and the judgment is not final so as to be the subject of direct exception.
- Had the exceptions of law been overruled, the exceptions of fact would have remained, and in such case the judgment would not have been final.
- (a.) Permission is granted to file exceptions pendente lite. 64 Ga., 740.

JACKSON, Chief Justice.

## WILSON vs. THE STATE OF GEORGIA.

- 1. A plea of autre fois convict should set forth the former record, including the indictment, so that it may be made to appear that the former conviction was for the same offence for which the defendant is now on trial. A mere general allegation that a former conviction has taken place is not sufficient, and such a plea will be stricken. 47 Ga., 568.
- When a jury is recalled for a charge on a special point, it is not necessary to repeat the entire charge as to points fully covered in the instructions already given.

SPEER, Justice.

v 68-54

Baldwin, Starr & Co. vs. McMichael, administratrix; etc.

BALDWIN, STARR & Co. vs. McMICHAEL, administratrix.

Where the name of the defendant was stated in the declaration, and the process attached was directed to the sheriff or his deputy, and required that the defendant be and appear at the return term of the court, the fact that in the formal statement of the case at the head of the process the name of the defendant was erroneously stated, did not render the process and judgment founded thereon void. Such defect was amendable. Hence, in a claim case, it was error to exclude the f. fa. on account of such defect in the process. Code, §§3345, 3334, 206, par. 6; 29 Ga., 339; 50 Ib., 96; 60 Ib., 116.

JACKSON, Chief Justice.

CHAMBERS vs. KINGSBERRY; SKRINE, for use, vs. LEWIS.

- To render a promissory note a sealed instrument, it should be so recited in the body of the note. The mere addition of a seal after the signature is not sufficient. Code, §2915.
- (a.) A note in the usual form, but with a seal added after the signature, will be barred after six years from maturity. Code, §2017.

· SPEER, Justice.

## WRIGHT vs. HAWKINS.

- An affidavit by a landlord that his tenant is "justly indebted" to him a specified amount of rent, is equivalent to a statement that the rent is due.
- 2. A counter affidavit that a part of the rent distrained for is not due, is sufficient to carry the case to the jury, and is not demurrable.
- 3. Where an affidavit to obtain a distress warrant states directly or by legal implication that the rent is due, and also adds the statement that the tenant is removing his property, the latter allegation may be treated as surplusage, and does not necessarily vitiate the proceeding.

Mitchell, solicitor general, ws. Gaines, sheriff; etc.

MITCHELL, solicitor general, vs. GAINES, sheriff.

MITCHELL, solicitor general, vs. Brown, treasurer.

- I. Where criminal cases were transferred from the superior court to the city court of Hall county in accordance with law, and a fund was raised therefrom in the city court, the officers of the superior court had no further claim thereon than to have such costs as had accrued in their favor in those cases prior to the removal paid. They could not have old insolvent costs paid therefrom. (See acts of 1880-81, p. 558.)
- 2. To a fund raised from criminal cases transferred from the superior court to the city court of Hall county the officers of the former court had no valid claim beyond the costs incurred in those cases prior to their transfer. Nor could the superior court allow a further claim on the part of its officers by order.

## JACKSON, Chief Justice.

Cited for plaintiff in error, Code, §4631; 39 Ga., 578; acts of 1876, p. 108, sec. 2; acts of 1880-81, p. 555, sections 36, 37.

For defendant, acts of 1880-81, p. 565, sections 30, 36, 37; p. 560, sec. 5; Code, §314; 54 Ga., 40.

#### FRANCIS et al. vs. HOLBROOK.

- I. Where a will is propounded and a caveat is filed, upon failure to establish the will, the court cannot go further than to enter up judgment for costs against the propounder. Though parties beneficially interested as legatees may have aided the propounder by employing counsel and subpoenaing witnesses, they are not such parties to the record as that a judgment for costs can be entered against them.
- (a.) Could one who propounds a will at the instance or for the benefit of another recover from the latter by assumpsit the costs which he had incurred by failing to establish the will? Quare.
- (b.) Semble, that if a will be bena fide presented for probate and not fraudulently pressed, and upon caveat the same is rejected, the costs should fall upon the estate. 22 Ga., 302.

JACKSON, Chief Justice.

Hancock vs. Perkins & Brother-Norfleet & Jordan vs. Vaughn et al., etc.

#### HANCOCK vs. PERKINS & BROTHER.

If it be sought to bring up evidence in a bill of exceptions, to be considered, it must be incorporated in such bill, or attached therete and identified by the signature of the judge thereon. Whatever precedes the judge's certificate is a part of the bill of exceptions, and may be verified by the certificate alone. What follows the certificate must be distinctly identified. 48 Ga., 566; 58 Ib., 346; 38. Ib., 689; 61 Ib., 492; 10th rule supreme court.

'CRAWFORD, Justice.

## NORFLEET & JORDAN vs. VAUGHN et al.

The verdict in this case is supported by the evidence.

(a.) If the original breaking and entering of one's close be wrongful, the retention of the property thereafter is also wrongful, and consequential damages are recoverable therefor; certainly so to the time of filing the writ, if not up to the time of the verdict. Juchter vs. Boehm, Bendheim & Co., 67 Ga., 534.

JACKSON, Chief Justice.

## HAM vs. PARKERSON et al.

While a written contract cannot be altered by parol, yet if its execution was the result of fraud, accident or mistake, such fact may be pleaded and proved by parol in avoidance thereof.

(a.) The evidence in this case showed that a defendant in f. fa., who was about to obtain an exemption in certain property levied on, desired to give the constable making the levy a forthcoming bond for the property, which the latter agreed to accept; a scrivener present volunteered to draw the bond, and did so, but made it a bond conditioned to pay the fa. fa. Neither the defendant nor the officer read the bond before it was signed, or knew of its contents:

Held, that to a suit on the bond such facts might be pleaded and proved by parol, and would constitute a good defence. 54 Ga., 289; 52 Ib., 149; 56 Ib., 31, 32; 59 Ib., 850.

McMichael, administratrix, vs. Hardee; Brady et al. vs. Brady, guardian.

## McMichael, administratrix, vs. Hardee.

- 1. Where the verdict and judgment were for a given principal with \$261.03 interest, and the execution stated the interest as \$261.00, the variance was immaterial, and was not sufficient to warrant the rejection of the f. fa. from evidence.
- 2. A suit having been brought by a surviving partner, judgment rendered, and execution issued in his favor, but the process attached to the declaration having stated the case in the name of the firm, on the trial of a claim case arising under levy of the f. fa., the entry of suggestion of death and order that the case proceed in the name of the surviving partner, could be entered nunc pro tunc.
- (a.) This question having been submitted to the court both on the law and facts, in the absence of anything to show the contrary, we will presume that he had satisfactory evidence before him that the suggestion had been made and the order granted at the proper time, but not entered on the minutes.

SPEER, Justice.

## BRADY et al. vs. BRADY, guardian.

A claimant who has once withdrawn his claim, and afterwards interposed a second claim to the same levy, cannot again withdraw it. The plaintiff in f. fa. is entitled to prosecute the case to verdict. 61 Ga., 470.

JACKSON, Chief Justice.

#### BELL vs. MORTON.

- Where a suit in a justice's court was for \$49.25 principal, alleged to have become due more than a year before suit, the interest attached to the principal in determining the amount claimed, and the case was appealable. Code, \$2057; 64 Ga., 684; 62 Ib. 608.
- (a.) Accounts which by custom become due at the end of the year bear interest from that time upon the amount actually due whenever ascertained.

Watkins vs. The State-Hawks, executriz, vs. Hawks.

#### WATKINS vs. THE STATE OF GEORGIA.

- 1. If after the commission of a crime the offender escapes and conceals himself so that he cannot be arrested, the statute of limitations will be suspended during the time for which such concealment continues. Code, §4665; 54 Ga., 55; 4 Ib., 335.
- (a.) Nor does it matter that the offender is arrested, and then escapes and conceals himself before indictment, and avoids a re-arrest; such concealment will suspend the statute of limitations. An indictment which alleged these facts was sufficient.
- 2. Where a man hailed a woman walking along a pathway, and holding something in his hand and saying he had plenty of money, told her to go into a gully, and on her retreating, drew a pistol, and advancing upon her, ordered her to turn back, and she escaped by flight, a verdict of assault with intent to rape, approved by the presiding judge, will not be set aside as unsupported by evidence.
- (a.) The fact of proximity of a house and public road to the scene of the transaction may have rendered the effort fruitless, but did not render it guiltless.

JACKSON, Chief Justice.

## HAWKS, executrix, vs. HAWKS.

- Prior to the act of 1874 (acts 1874 p. 19) the statutory homestead provided by \$2040 of the Code was not subject to a judgment for purchase money.
- 2. A judgment regularly obtained in favor of cestuis que trust could not be set aside in a court of equity at the instance of one who claimed to have had a contract with the trustee or the head of the family to the effect that he would not obtain the judgment, which contract was not carried out, if the party seeking to attack the judgment was guilty of laches in failing to see if the contract was carried out and in delaying for eight years to take any steps to set aside the judgment.
- (a.) Much less will a court of law set aside such a judgment when collaterally attacked on such grounds, and the evidence for that purpose was inadmissable.
- An exception founded on the admission of testimony will not be considered by this court where no ground of objection is stated.

CRAWFORD, Justice.

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Hays vs. Hamilton, agent-Robinson vs. The State.

## HAYS vs. HAMILTON, agent.

- I. Where a case has been set ten days in advance of trial and parties notified thereof, the absence of the defendant when the case is called is no ground for a continuance.
- (a). Where interrogatories had been sued out within twenty days before the session of court, and mailed before the term began to the witness to be executed and returned, counsel stating that he had been informed by his client what he might expect to prove by them, but being unable to state directly what they would testify, such facts gave no ground for a continuance.
- Where suit was brought on a note under seal, in the absence of any
  plea of non est factum, it was properly admitted in evidence without proof of execution.
- 3. Where a defendant, after due notice of the time of trial, failed to arrive until shortly after the jury had retired, there was no error in refusing to allow him to explain his absence, and to recall the jury to hear his testimony.
- 4. No sufficient ground for excepting appearing in this case, ten per cent. damages are awarded against the plaintiff in error.

CRAWFORD, Justice.

#### ROBINSON vs. THE STATE OF GEORGIA.

- I. Where a witness who testified at a committing trial subsequently died, on the final trial of the same case in the superior court his testimony so given was admissible, and there being nothing to show that it was reduced to writing, it was competent to prove what such testimony was by parol. Code, §3782; 45 Ga., 283; 61 Ib., 448; 63 Ib., 692.
- 2. Where an indictment charged the larceny of a horse belonging to Joel W. Perry, and the evidence was that the horse belonged to "Colonel Perry," whom one of the witnesses called his father-in-law, the identity of the owner as charged and as proved, was for the jury; and in the absence of any conflicting testimony as to the ownership or of proof that there was any other Perry in the county, a verdict of guilty will not be set aside as contrary to law, on the ground that the probata and allegata did not agree as to ownership.

JACKSON, Chief Justice.

Ryal, executor, vs. Morris-Trippe vs. The City of Atlanta.

## RYAL, executor, vs. MORRIS.

- A partial payment of a promissory note, to relieve it of the bar of the statute of limitations, must be entered by the debtor or some one authorized by him to do so; but the creditor is incompetent for that purpose. Code, §2935.
- 2. That a debtor insisted upon having certain land lines located before paying the note given by him for the purchase money of such land, and the creditor thereupon waited until the note was barred by the statute of limitations, will not relieve the bar of the statute, the note itself being absolute and containing no condition in regard to lines.

SPEER, Justice, concurred dubitante.

CRAWFORD, Justice.

#### TRIPPE vs. THE CITY OF ATLANTA.

A declaration sought to recover damages from a municipal corporation. It alleged the following facts: Plaintiff was riding along one of the streets of the city when his horse became frightened and ran away. Plaintiff succeeded in stopping him, when he began to kick against the dash-board, and plaintiff sprang from the buggy. The street for some distance in that vicinity was in very bad condition, and had been so for a considerable time, and the city had notice of the fact; there were deep and ragged gullies washed in the street and in the bottom of one of them was a deep and narrow rut; into this plaintiff's foot slipped, and being unable to keep his equipoise he fell, his leg was broken and he was badly injured. The injury would not have resulted but for the gully which defendant's negligence allowed to remain in its street, and was exclusively and wholly caused thereby:

Held, that the allegations of the declaration made a prima facie case, and it was not demurrable. Dillon on Mun. Corps., §§1007, 1015, 1019 (3d ed.); 50 Ga., 544; 60 Ib., 474.

Champion vs. Champion-Cleveland vs. Treadwell-Tyson vs. The State.

#### CHAMPION vs. CHAMPION.

- 1. On a question of alimony pending a libel for divorce, made in term particularly, this court will not scan closely the ruling of the court on the matter of notice or continuance of the case on account of the absence of a witness. These matters rest much in the discretion of the presiding judge, and this record furnishes no evidence of its abuse.
- 2. The alimony allowed seems reasonable and proper under the law and facts disclosed in the record, and no legal ground is shown to disturb the judgment. The whole thing rests in the discretion of the court. Code, 251737, 1738, 1739, 1740, 1741.

JACKSON, Chief Justice.

#### CLEVELAND vs. TREADWELL.

- I. Where the judge who presided at the trial of a case did not hear the motion for a new trial, but it was heard and overruled by the judge of another circuit temporarily presiding, the reluctance of this court to interfere with a verdict approved by the presiding judge, as contrary to law and evidence, has no application.
- 2. The charge of the court was fair and legal.
- 3. The verdict was contrary to law.
- (a.) Where two persons, owning land under a common feoffor, had agreed upon and marked a dividing line between them, and subsequently processioners were called in by the vendees of such parties to lay out and mark the line between them, they should have had regard to such agreed and marked line, and a line run by them totally irrespective thereof was illegal. Code, §2387.
- 4. Acquiescence by acts or declarations for more than seven years in a dividing line is sufficient to establish it. Code, §2388.

JACKSON, Chief Justice.

#### Tyson vs. The State of Georgia.

The charge of the court was not unsupported by evidence, and the verdict is fully upheld by the evidence.



Cox et al. vs. Barber et al.-Hillsman vs. The State-Hambric vs. The State.

#### COX et al vs. BARBER et al.

Two executors sold realty of their testator; a third party bought; on the same day he conveyed the land to one of the executors individually; some two years thereafter the latter sold to a purchaser for value; the deeds on their face all purported to be for a fair and valuable consideration:

Held, that in the absence of all actual notice, these facts appearing from the recorded deeds were not sufficient to put the purchaser on notice that the sale was by an executor to himself, so as to prevent his being entitled to protection as a bona fide purchaser.

JACKSON, Chief Justice.

## HILLSMAN vs. THE STATE OF GEORGIA.

- 1. An indictment which charged that the defendant broke and entered the storehouse of a person named with intent to steal therefrom thirty dollars in money therein found, of the value of thirty dollars, and the property of the owner of the storehouse, was not demurrable for want of a more accurate description of the kind of money so to be stolen. Code, §4628; I Wharton Crim. Law, 320; 2 Bish. Crim. Proc., 142, 145; 2 Arch. Plead. and Prac., 1072-3.
- (a.) Is any description of the goods intended to be taken from the house where things of value are stored necessary? Quare. 54 Ga., 106.
- 2. The verdict is supported by the evidence.

JACKSON, Chief Justice.

## HAMBRIC vs. THE STATE OF GEORGIA.

- 1. The verdict is sustained by the evidence.
- Exception to the charge as a whole is too general, and will not stand if any part of the charge is right.

Garlington vs. The State-Coleman vs. Jones-Matthews vs. Bivins, executrix; etc.

#### GARLINGTON vs. THE STATE OF GEORGIA.

The verdict is supported by the evidence, and the charge not being set out in the record, we will presume that it was full and proper.

SPEER, Justice.

## COLEMAN vs. JONES.

- We find no error in the rulings or charge of the court in this case, and the verdict was not contrary to the law or the charge of the court.
- (a.) This case is distinguished in its facts from that in CO Ga., 654.

SPEER, Justice.

## MATTHEWS vs. BIVINS, executrix.

- 1. The verdict is supported by the evidence.
- 2. This writ of error does not appear to have been prosecuted for delay only, and damages on that ground are refused.

SPEER. Justice.

## CHILDERS vs. THE STATE OF GEORGIA.

When a new trial is sought on the ground of newly discovered evidence, the party as well as his counsel must negative all previous knowledge thereof. Evidence known to the party himself before trial cannot be newly discovered after verdict.

Dougherty vs. Reed-Leverett vs. Cook, administrator-Henderson vs. Sledge; etc.

#### DOUGHERTY vs. REED.

The verdict was not contrary to law, evidence or the charge of the court; nor were the damages awarded excessive.

SPEER, Justice.

## LEVERETT vs. COOK, administrator.

- 1. The verdict is supported by the evidence.
- Newly discovered evidence which could have been obtained on the trial by the use of ordinary diligence, or which would not have been admissible if produced, or which would be cumulative only, furnishes no ground for a new trial.

SPEER, Justice.

HENDERSON vs. SLEDGE; HUGHES vs. MAPLES; HAWK vs. LEVERETTE et al.; THOMAS vs. THE GEORGIA RAILROAD.

There was no abuse of discretion in granting a new trial in each of these cases.

McDonald vs. The Eagle and Phenix Manufacturing Company.

# McDonald vs. The Eagle and Phenix Manufacturing Company.

[By reference to 67 Ga., 763, it will be seen that the original decision in this case was withdrawn from the reporter's hands by Justice Sperr, who stated that he handed it to Mr. Peeples, of the clerk's office, for return to the reporter; that Mr. Peeples had no recollection of such an occurrence; and that it never was returned to the reporter. Since the publication of 67th Ga., it was discovered among a lot of waste papers which were gathered up from the court room. It is now published at once upon its discovery.]

- 1. To entitle the widow of a servant to recover against a principal for the negligence of a fellow-servant of that principal, for the homicide of the husband which resulted from such negligence, it must appear that the homicide amounted to a crime in said neglectful servant, either murder or manslaughter of some grade.
- 2. A principal is not liable for the negligence of a fellow-servant in the same job, unless the principal himself was negligent in not using ordinary diligence in selecting the fellow-servant, or in retaining him after knowledge of incompetency or negligence. Nor will the bare fact that the servant afterwards became negligent show, without more, negligence in the principal in selecting.
- 3. One may waive the special contract and sue in tort for breach of duty, if there were such special contract, and the contract might warrant the competency and care of the fellow-servant, and be then invoked to change the legal principle on which the liability of the principal would turn for the tort; but no special contract is set out in this declaration so as to vary that general legal principle.
- 4. A workman engaged in the same job with two or three others, and having the direction of it, is not a general superintendent of a corporation, so as to bind it as such, but stands on the footing of a mere fellow servant.
- 5. The law as to railroads and druggists rests on other grounds.

Damages. Negligence. Master and Servant. Husband and Wife. Before Judge WILLIS. Muscogee Superior Court. May Term, 1881.

Charlotte McDonald sued the Eagle and Phenix Manufacturing Company to recover damages for the homicide of her husband. On demurrer the court dismissed the case, and plaintiff excepted. The declaration was as follows:

"The petition of Charlotte McDonald, showeth that the Eagle and Phenix Manufacturing Company, a corporation of the state of GeorMcDonald w. The Eagle and Phenix Manufacturing Company.

gia, resident in the county of Muscogee, has damaged your petitioner in the sum of \$10,000.00.

For that heretofore, to-wit, on the —— day of June, 1879, at the request of defendant, Absolom McDonald, who was her lawful husband, and up to the time the injuries hereinafter stated were received by him, was a carpenter by trade, forty-seven years old, in good health and of a strong constitution, and whose services were worth an average of two dollars per day, was employed by the said defendant as an ordinary workman to aid in building a dye house in said county of Muscogee, the said defendant undertaking to furnish a careful, prudent and skillful superintendent to direct said work, and competent and careful laborers to aid in constructing the same, and especially to manage a derrick and ropes, tackle and machinery attached to said derrick, by which large timbers were to be hoisted to a great elevation, which said timbers your petitioner's said husband was to adjust and put in place in the frame work of said building, when carefully conveyed to him by means of said derrick and ropes, tackle and machinery attached by said laborers, under the orders and direction of said superintendent. Yet the defendant, not regarding its duty, placed in charge of said derrick and ropes, tackle and machinery attached, a careless and negligent superintendent, and one or more careless, incompetent and negligent laborers, and by want of due care and diligence, and by negligence, so managed the said derrick and ropes, tackle and machinery used to hoist said heavy timbers, as to knock the prop which supported her said husband from under him, and precipitate him from a great height upon some timbers near the groundwhen a large piece of timber, suspended by means of said derrick, fell upon him, by which said fall and fall of said heavy piece of timber her said husband was crushed, bruised, wounded, and so hurt that he languished in great pain, and died by reason of said wounds within twelve hours afterwards, and from thence and for all time deprived your petitioner of the companionship, comfort, labor and services of her said husband. That at the time said fall occurred, which so occasioned the death of her said husband, he was faithfully, cautiously, diligently, and without any fault on his part, performing his duty under the direction of defendant.

Your petitioner was thereby forced to lay out and expend divers sums of money, in the whole amounting to one hundred dollars, for attention in sickness and burial expenses of her said husband, while she endures inconsolable grief; and has sustained other damages, to the value of ten thousand dollars."

SMITH & RUSSELL, for plaintiff in error.

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PEABODY & BRANNON, for defendant.

JACKSON, Chief Justice.

This was a general demurrer to plaintiff's declaration, in which she declared against the Eagle and Phenix Manufacturing Company for the homicide of her husband. The demurrer was sustained and the action dismissed, and this judgment is assigned as error.

This is an action authorized by statute, and the statute is codified in section 2971 of our Code. It authorizes the widow to sue for the homicide of her husband. homicide, used in the statute, means the killing of the husband in some unlawful manner. Code, §4313. Qf course it cannot mean justifiable homicide, for it would be out of all reason to permit a recovery of damages from a person who had committed no unlawful act, but whom the law justified in doing what he did. The statute, therefore, means some grade of unlawful homicide. not alleged in the declaration that this corporation voluntarily through any agent or servant killed this man, nor is it averred that the homicide occurred by criminal negligence on the part of the company or any of its agents. The facts alleged do not show that any agent or servant of the corporation was guilty of murder or of any grade of manslaughter, voluntary or involuntary. If any criminality attached in this case, it was clearly unintentional, and must have made a case of involuntary manslaughter. Was it that offence?

The Code, section 4327, declares that "involuntary manslaughter shall consist in the killing of a human being without any intention to do so, but in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner." No unlawful act is alleged to have been committed here, nor any lawful act which probably might produce such a consequence in an unlawful manner. The allegation is that the defendant employed a careless and negligent superintend-

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ent to manage a derrick, and ropes, tackle and machinery attached, and one or more careless, incompetent and negligent laborers, whereby the plaintiff's husband fell, by want of their care and diligence. It goes only to this extent. It does not make the case of voluntary or of involuntary manslaughter against anybody; and for such an accident, though it might have been avoided by care and diligence. we do not think that there can be a recovery under the statute. And so this court has held in principle. September term, 1880, Daley vs. Stoddard.

And here we might rest this case. But even if death had not ensued, and the action had been by the injured man for damages, under both the common law and the Code, we do not think the declaration sufficient. The Code seems emphatic: "The principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business; the exception in case of railroads has been previously stated." Code, §2202. It is for his own negligence or misconduct that he is liable; and hence his liability rests on his own negligence or misconduct in the employment of his agents, and if he uses ordinary diligence in employing competent men, it is enough to relieve him. Sherman and Redfield, par. 90; 2d Thompson on Negligence, 971. He is not liable for negligence of a fellow servant while engaged in the same employment, unless he has been negligent in the selection of that servant, or retained him after knowledge of his incompetency. Sherman and Redfield, par. 86; 2 Thompson, 951, 969, 970, and cases there cited. Nor will the fact that the person proved incompetent of itself, and without more, show negligence of the master, but it must further appear that the master knew, or might have known by ordinary diligence, the incompetency of the agent or servant. Law of Master and Servant, 393, 429, 432; 2 Thompson, 969; Sherman and Redfield, 91; 1 American Railway R., 596.

To apply these principles to this case,—there is no alle-

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gation that the defendant was negligent in employing the servants here, but it is only alleged that it did employ those who were negligent as it turned out. There is no allegation that it did not use ordinary diligence to employ competent and careful men, or that it knew when employed that they were not such, or retained them after such knowledge. Squaring these allegations with the law, we do not see that, admitting all that is alleged in the declaration, there can be a recovery against the company. It is true that this defendant is a corporation, and actsthrough agents, and can act in no other way; but we put its general agent, who employed these servants, precisely in the place of the company, and hold the company liable precisely to the extent that we would hold its general agent liable had he been principal. If he was negligent,. and did not act with ordinary diligence in the employment of these servants for himself, he being a natural person and not acting for the corporation, then he would be personally liable; and if acting as the agent of this corporation, to employ these servants, he was neglectful and did not use ordinary diligence, then the corporation would be in like manner liable, but neither would be liable if ordinary diligence was used in the employment of the servants by him who employed them, whether as an individual or as the agent of the corporation.

An effort was made by the able counsel for the plaintiff in error to take this case out of these principles, on the ground that a special contract was made whereby it was stipulated and guaranteed that the company would employ competent and careful men; but we do not see any special contract set out in the declaration. It seems to be merely based upon the general duty of the employer to the employé. It is not alleged that there was in terms any special contract. It is not alleged that the parties met and made a special contract with stipulations on each side, but the allegation is simply that of the employment of a man to do work and corresponding duty

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on the part of the employer to furnish competent assistants. But if this employment had been a special contract, as it is set out, we do not see how it makes the duty stronger than that which the law annexes to every employment of a servant—the duty to use ordinary diligence to employ competent and skillful fellow-servants. True, there might have been a contract made by which the competency and skill and care of the fellow-servants would have been warranted by the corporation, but certainly there is nothing of the sort alleged here. That one may waive the contract and sue for the tort as breach of duty, springing out of the contract, see I Add. on Torts, pp. 26 and 27, note 1; 2 Ib., 527; 13 Peters, 181; Pierce on R. R. Law, 487-90. This is a case of that sort, if there be any contract here other than ordinary employment.

One of these servants employed in this work is called superintendent, and is alleged to have been at the head of the management of the derrick, etc.; but we do not see that he was such a general superintendent for this corporation as to make it liable as acting through him. On the contrary, the averment only makes him the head of a little job to do that job; and to all intents and purposes a fellow-servant.

The law in respect to the liability of railroad companies and druggists rests on other grounds. Code, §§3005, . 2083, 3036, 2202.

Judgment affirmed.

## APPENDIX.

On January 31st, 1882, the committee appointed to prepare an appropriate memorial of the life and character of the Honorable Hiram Warner, deceased, late ex-Chief Justice of the Supreme Court, submitted the following report:

#### HON, HIRAM WARNER,

Though not a native of Georgia, was her son by early adoption, and made himself, by long and useful public service, one of her most illustrious citizens. His name is interwoven with her history for half a century. Whilst mourning his death, we rejoice in the recollection of his life and in the fruit of his labors—fruits not only remaining to us of the present generation, but sure of descending to remote posterity.

He was born in the town of Williamsburg, county of Hampshire, State of Massachusetts, on the 29th of October, 1802. His parents were of English stock, the descendants of families who had established themselves in New England in the early settlement of the country. His mother, a woman of strong Christian faith and principle, and remarkable for her intelligence, was formerly a Miss Coffin, a member of the very numerous family of that name inhabiting Nantucket and Martha's Vineyard. His father was a farmer in moderate circumstances, accustomed to manual labor. Hiram, the eldest child, aided his father on the farm, and was sent at intervals to the excellent common schools of the neighborhood, and finally to one of the higher academic institutions, where he acquired an average classical and mathematical education.

At the age of nineteen (A. D. 1821) he set out for Georgia to take the position of assistant teacher in Sparta Academy. The vessel in which he sailed was wrecked off Cape Hatteras. He escaped, made his way to land, returned with succor to those who were still upon the wreck, and after all were saved, shipped again for the Georgia coast in another vessel, and finally reached Savannah sick with measles. This

illness proved a very dangerous one, but he recovered, completed his journey by stage-coach, and located at Sparta. Here, and at Blountsville in Jones county, he taught school, reading law at the same time, until the fall of 1824, when he was admitted to the bar. His admission took place at Monticello, Jasper county, the Hon. Augustus B Longstreet being the judge presiding. In a short time he settled at Knoxville, Crawford county, and there entered on the practice of his profession. He represented that county in the Legislature from 1828 to 1831, both these years inclusive, and in 1832 was a delegate to the anti-tariff convention, and was one of those who seceded from that convention in company with John Forsyth, Towards the close of 1832 he removed to Talbot county, and formed a partnership with Col. Geo. W. Towns (afterwards Governor), and he practiced as a member of the law firm of Warner & Towns until made Judge of the Coweta circuit. That circuit was created in the winter of 1833, and though he did not reside within it, the General Assembly elected him to preside over it. His first court was held at Greenville, Meriwether county, on the fourth Monday in February, 1834; and about a year later he removed into the circuit and established his residence in the vicinity of Greenville, and here was his home for the rest of his life. Re-elected Judge in 1836, for four years, he served out the term, and in 1840 was again a candidate, but the Legislature, differing with him in politics, declined to renew his commission and elected his competitor, Hon. William Ezzard, to succeed him. Resuming the practice, he entered into partnership with his brother, Obediah Warner. The firm of H. & O. Warner existed for some years and enjoyed a large and lucrative business. In 1845, on the organization of the Supreme Court, he, though a Democrat, and though the Whigs were in power, was unanimously elected to what, in view of the comparative length of the term, was the middle or intermediate position on the bench of this tribunal, his term of office being four years, whilst the terms of the other two Judges, his colleagues, were six and two years respectively. Elected again in 1849, for six years, he served until June, 1853, and then resigned and returned to the bar. In 1855 he was elected to Congress, and in 1860 was a member of the Secession Convention.

After the war he was called to resume judicial functions by executive appointment, in the spring of 1866, to a vacancy on the bench of the Coweta circuit. The people of the circuit elected him to the same position in the following January, and in June, 1867, he was appointed by the Governor Chief Justice of the Supreme Court, in consequence of the death of Chief Justice Lumpkin. Reconstruction supervened, and a new organization of the court took place under the

Constitution of 1868, when, though he was of opposite politics, he was nominated by Gov. Bullock to a place on the bench as one of the associate justices, and confirmed by the Senate. For a second and last time he became Chief Justice in January, 1872, on the retirement of Chief Justice Lochrane, and remained in office until August, 1880, when he resigned and his life's work was finished. He died in Atlanta on the 30th day of June, 1881, and was buried in the village cemetery at Greenville by the side of his departed wife, who was Sarah Watts, the daughter and only child of Edmond Abercombie, of Hancock county, and to whom he was married in the year 1827. He left one daughter, Mrs. Mary Jane Hill, wife of Col. A. F. Hill. She is the mother of a numerous family of children, to whom he was a devoted grandfather, and whose warm and affectionate attachment in return cheered and brightened his old age.

In politics Judge Warner was a republican of the Jeffersonian school, and in his early manhood was a member of what was called in Georgia the Clarke party. After the days of that party he was a national democrat, and so remained to the close of his life. He was an ardent friend of the Union, and in the convention of 1860 opposed secession, but on the passage of the ordinance signed it in token of his determination to adhere to the fortunes of the state as moulded by a majority of his colleagues, though his own judgment disapproved of their action.

The result of the war to him personally was the emancipation of over one hundred slaves, besides heavy losses in other respects, but his spirit remained unbroken, and upon the remnant of his fortune he built up, by his earnings and savings, an estate ample for his own comfort, and affording a helpful provision for his grandchildren. Though so much of his life was given to the study, practice and administration of the law, he was by no means a mere lawyer, but had extensive information and sound opinions upon many practical subjects, and was, prior to and during the war, a most successful planter on a large scale. He delighted in agriculture, and was always in close and kindly sympathy with the tillers of the soil. With about equal fitness he could be classed either as a farmer judge or a judge-farmer. Nor was he indifferent to any other of the useful vocations or material interests of the world. He maintained a vigilant outlook upon all the great departments of industry and enterprise, and was alive to every agency and indication of prosperity, whether for his neighborhood, his county, his state or the United States. He believed in "getting along," and had no taste for inaction or reaction. He possessed no element of the recluse or the dreamer. He loved contact with hard, practical facts and with the movement and push of busy life; when

he could not take part as an actor, he looked on as an interested spectator.

In religious faith and practice he was reared a Presbyterian, and though he never became a communicant of that or any other church, he lived and died a believer in the inspiration of the Bible, the truth of Christianity and in the distinctive tenets of the denomination to which his ancestry belonged, and to whose formative influence his own childhood and youth had been subjected. His last illness was protracted and painful. He bore it with exemplary fortitude, and was not afraid to die. Holding fast to the spirit of Christianity he was in no trepidation, though he had not been an observer of all of its forms. The effect of physical suffering upon his personal appearance was, towards the last, remarkable. It seemed to have purged out all the animal from his nature and left only the spiritual. He looked like a noble bust, carved by some great artist of antiquity from the purest marble, and animated with the soul of a hero. His countenance was a model of refined grace and dignity, and his head was majesty personified.

His long and able judicial career was and will ever be his life's crowning glory. He served on the circuit bench with distinction, and on the Supreme bench with pre-eminent reputation. Between the delivery of his first and his last opinion in this tribunal was an interval of more than thirty-four years, and the aggregate number of his opinions may be stated with a fair approach to accuracy at 1,969, of which number 78 were dissenting opinions. They are contained in the Georgia Reports—volumes 1 to 13, and volumes 36 to 65—a series of forty-three volumes. Such a monument renders him secure of juridical immortality. It was moreover his fortune, by virtue of his attain as Chief Justice, to preside over the Senate through two impeachment trials, adding to his otherwise varied and extensive experience a most unusual one in this rare department of forensic administration.

Whether regarded as a judge or as a man his great, dominant characteristic was strength. He was vigorous and sound—strong in intellect, in will, in purpose, in integrity, in force of character, and in the energy of duty. He stood squarely to his post on all occasions and under all circumstances, and followed his convictions wherever they led. It is probable that he feared no being in the universe except the living God, but with all his intrepidity he was free from any disposition to domineer over others, or to provoke contention or controversy. For a mere dispute or idle argument he had no relish. He was always deliberate and self-possessed, and held his powers well in hand. If somewhat strict in bringing others up to duty, he was even less indulgent to himself. He was the most prompt and punctual of men.

When he worked by the clock he was never tardy; it is certain that for years he was not late in a single instance, even for a second. He eschewed bad habits, but was assiduous in the cultivation of good ones. His uniform regularity of life contributed greatly, as he himself believed, to preserve health and soften the approaches of old age; and his physical preservation was, indeed, remarkable, as down to the commencement of his final sickness he was perhaps twenty years younger in appearance than in fact. His mental vigor, also, was but slightly impaired except in the attribute of quickness, and, even in that, he had twice or thrice the relerity of the average old man.

Long as he lived and much as he accomplished, there was, when he went into retirement, something like a general opinion that he was not worn out—that he had capabilities for more work, and would reappear on the active scenes of life. His friends, notwithstanding his forebodings that on ceasing to-labor he would soon cease to live, were sanguine that he had before him the prospect of a robust and protracted old age, and that he would enjoy in retrospect much of the past which he had been too busy to enjoy when it was the present. But his own presentiment proved to be the truest augury; in less than one year after he put off his harness, and withdrew from the accustomed round of daily duties, he was taken from earth, and transferred, we devoutly hope, to mansions of everlasting rest.

Peace to his ashes, and honor to his memory!

In behalf of the Bar of Georgia, we extend to the family and kindred of our deceased brother assurance of sincere condolence and sympathetic sorrow, and request that this report be spread upon the minutes of the court, and become matter of record for all time.

> L. E. BLECKLEY. C. J. JENKINS. JOSEPH E. BROWN, O. A. LOCHRANE. H. K. McCAY, R. F. Lyon. R. P. TRIPPE. W. W. MONTGOMERY. W. A. HAWKINS, J. W. PARK,

Committee.

At the conclusion of this report, Chief Justice Jackson inquired if there was any member of the bar who desired to make any remarks applicable to the subject of the report. Z. D. Harrison, Esq., spoke as follows:

May it please your Honors: Because of expressed friendship for my revered father by the late ex-Chief Justice of this court, because of his generous confidence in me, and because of the gratitude I feel, and the love and veneration I shall ever cherish for him, I am constrained to venture an expression in commemoration of his life and character.

I have listened with a throbbing heart to the beautiful tribute to his memory reported by your committee—his noble and generous compeers. Thus embalmed, naught that I may say can add to or detract from the grand figure therein portrayed, and yet I feel that I would and must my own tribute offer.

"What is excellent, as God lives, is permanent." Then, indeed, should he who has left us so heroic an example of rare integrity of soul live forever. In his life we have an illustration of the truth that simplicity and grandeur go hand in hand. Far removed from all false and exaggerated furors, he was yet a teacher who outranked the pedants of all the schools; for he taught us by his daily walk the lesson of fidelity to duty. This with him was the measure of all excellence, and with this measure he measured unto himself and others. Brave and severe in his denunciation of all false doctrines and heresies, fearless in the maintenance of truth, with faithful devotion and untiring energy, he taught that "there is no earthly pleasure like daily duty well done."

To those who knew him most intimately there were sometimes given rare glimpses of a nature large and generous, of a tender, loving heart, which his dignified and cold exterior seemed to hide. The firm grasp of his kindly, helpful hand, and his earnest words of hopeful encouragement quickened anew sinking spirits, and made hearts strong to endure.

Honor to the brave soul who, by its unshaken fidelity to conscience, reached the great heights of a God-like manhood and rests there, in the clear white light of truth!

Justice Martin J. Crawford then made the following response to the report of the committee:

To sit by in silence upon this occasion would be an act of injustice both to the distinguished dead and to myself. I must be permitted, therefore, to give expression to the high appreciation in which I held the late Chief Justice of this court.

Our first intimate acquaintance began with the opening session of the 34th congress of the United States, now more than a quarter of a century ago. From that day to the last day of his life, whenever and wherever we met, we always met as friends. He had, and deserved to have, both my confidence and my respect: yea more, he had my admiration for his many noble traits of character as a man, and for his ability as a lawyer and a judge.

The tribute to his memory just offered by the committee truly represents the qualities of the man; he was strong in intellect, will, purpose and integrity, and I will add in all the attributes which fit a man for high judicial station. 'Tis said:

"Plate sin with gold, and the strong lance of justice breaks: Clothe it in rags, and a pigmy's straw can pierce it."

Not where Warner sat could this be charged. His devotion to a legal principle was stronger than his friendship for any man; his strict sense of justice, as founded in law, was followed wherever it led; his decisions were but his convictions of law, and he would stand to its cold letter at the risk of the loss of friends or place.

So fixed was his purpose to administer the law that he was thought by some to have been cold and indifferent to its consequences, whilst it was but his loyalty to the law alone that governed his action.

I knew much of his life's history, obtained from his own lips. I know of his early struggles with adverse fortune, and I know how his success was won. He had an aim in life—it was to become distinguished in his profession. He took the road that led to its accomplishment, and he never allowed any seductive influences to entice him into diverging paths. He made companions of his law books, until his fondness for them became stronger than his companionship for men, and hence he was oftener sought as a lawyer and a judge than as a man for political station.

And as has been said, he left behind him in nearly fifty volumes of our reports the evidence of his labor and learning. Had he owned the wealth of the state, his bereaved ones could not have built of brass or of marble so grand a monument to perpetuate his memory as is contained in the silent lines of these reports, now read and appreciated in every state of this union. "The true measure of a man at last is what he made himself." Taking, then, this as the standard, we see that he has used his time and thoughts to mould into immortal form the measure of his greatness, and left it in a shape to benefit his countrymen forever.

Let me repeat that justice to my departed friend forbade my silence. I only regret my inability to speak of him as he deserved.

## Justice A. M. Speer responded as follows:

It was neither my privilege nor good fortune to be on terms of personal intimacy with the late venerable Chief Justice, of whom your report so eloquently and truthfully speaks. But the lawyer who has

not become familiar with his judicial life in the records of this court confesses himself a stranger to the jurisprudence of our state. While neither gifted with the rich and captivating eloquence of the first chief justice or distinguished for the smooth, classic style of Judge Nisbet—his two associates on the bench in the organization of this court—yet his opinions upon record were excelled by neither in the clear, lucid presentation of the questions submitted or the purity and vigor of the style in which he discrissed them. His opinions bear the highest evidence of the thorough cultivation of his reasoning faculties—expressed in the purest Anglo-Saxon language, without effort at embellishment, and with the purpose alone to make clear and comprehensible the conclusions to which the logic of the argument led him.

The mind of Judge Warner was pre-eminently judicial. Thorougly versed in the principles of law as a science, aided by a memory remarkable in retaining cases in which those principles had been applied by the greatest lights of the judiciary, he was rarely at fault in his convictions.

To him the science of law and its investigations, however abstruse or perplexing, never lost their charm. The great fundamental principles lying at the foundation of our social fabric, under constitutional government, he clung to with a fixedness and fidelity that neither public opinion, popular clamor nor the fearful condition of a ruined and impoverished people, could for a moment affect. In spite of constitutional conventions, legislative enactments, and the wreck and ruin of a plundered and impoverished people, he planted himself upon the sacredness of contracts-firmly and unflinchingly breasted the storm until the supreme judicial tribunal of the government vindicated his loyalty to constitutional principles, and chrystalized his dissenting judgment by an affirmation on their records, there to remain as a memorial of his ability and a record of his fidelity to duty. Thorough master of the common law as a science, to his latest life he made Blackstone his companion, and annually from its pages refreshed his knowledge of their elementary principles, whose wisdom and justice now rule so large a portion of the human race. But neither talents nor service, neither learning or logic, neither unsullied records nor fidelity to trust can avert the doom that pronounces all men mortal. It is the longing of every human heart to be remembered when it dies. Under the inspiration of this yearning, men toil, struggle, pass seas, scale mountains, traverse continents. We know the destiny of our race is the coffin—the tomb—silence—earthly oblivion, and yet how noble the inspiration that desires to live in the future, if that inspiration is exalted into a desire to be remembered in the good we have done to our fellow-men! What nobler life can be passed than to wear

for near half a century the spotless ermine, and with clean hands and a pure heart administer justice to men! To interpose the arm of the law to shield the weak against the strong—stay the hand of wrong, fraud and oppression, and avenge the blood of the innocent shed in sin!

Never, in the judicial history of our state, has it fallen to the lot of any of its long line of distinguished dead to render so much of public service as the record shows was the fortune of the late Chief Justice. Early in his professional life, public confidence called him to public honors and high trusts, and so they continued, with scarce any intermission, until he had well nigh attained the utmost limit of life assigned to man. A life thus spent—noble, pure, unsullied by suspicion in his office, he passed to the tomb. His fame—what a legacy to his descendants! What an honor to his race! What a glory to his state!

Chief Justice James Jackson responded as follows:

Before directing this truthful and appropriate memoir of the illustrious dead to be spread on the minutes of this court and sterotyped upon the pages of its reports, the impulse of my heart, no less than the propriety of my position as his successor in this high office, which he adorned so long, prompts me to add a word to that which has been so well said.

A member of the general assembly of 1845, which selected the justices of the first Supreme Court of Georgia, and a democratic representative therein, it became my duty to assist in the caucus of the party in naming one of the lawyers to be placed on the supreme bench, then for the first time organized by law. So much brighter shone the luster of one name above all others of that party for judicial talents, illustrated by eminent service on the circuit bench, that our task was easy, and the choice immediate, unhesitating and unanimous.

A boy, some nineteen years of age, left his paternal home in New England to seek fortune and fame in a land of strangers. His only patrimony was the intellect the great Father had given him—his only assurance of success, the consciousness of its possession. The few dollars in his pocket when he embarked were lost in shipwreck; severe illness, nigh unto death, followed that disaster; the charity of sisters of mercy at Charleston, where first he landed on southern shores, nursed and restored the penniless lad to health; alone, unfriended, he wended his way to Georgia, and finding an acquaintance in the teacher of a school at Sparta, this acquaintance was informed of his situation, became a friend and employed him as his assistant. Thus in the daylight he earned his bread in the sweat of his face; at

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night he poured over the pages of a book which became, with another book his mother had given him, the occupant of his chamber to the day of his death, One of these books contained the fundamental stones of the English law, which the genius and labor of Blackstone had dug out of that chaotic rubbish where they had lain for years hid from the mass of readers, and discoverable only to the indefatigable student after arduous search. The other was the work of the Great Law-Maker, which the trusting faith of a New England mother confided, wet with tears and sanctified by prayer, to the hands and heart of her wandering boy. Upon a thorough knowledge of the one was built that legal and judicial fame which will endure while Georgia lives -"esto perpetua;" on the other, that faith which called the Rev. Dr. Boggs to his dving bedside, which made that divine his constant visitor during his protracted illness, and which induced the doctor to say in the midnight service that preceded the carrying his remains to Greenville, that he had confidence in his faith in Christ as his Savior, and a good hope of his eternal peace in the haven of the Christian.

After a short sojourn in Sparta, Crawford county became his home; a seat in the general assembly from that county he filled for years; thence, as you have heard, he removed to Talbotton; thence, on his election to the bench of the Coweta circuit, to the residence near Greenville, his until his death, and now and for generations to come, we trust, the home of his descendants.

Thus the poor, wandering boy, by successive gradations, with unfaltering footsteps and unshaken faith, ascended the stairway of Fame's lofty temple. Legislative and congressional honors, forensic and legal distinction, were acquired and left behind; and he sat here in the serenity of a protracted evening of life, clothed in ermine of the finest texture which Georgia could wrap around him, filling the full stature of the garment so exactly that it seemed the robe had been made to fit every limb of the wearer.

What a grand life is this! What an incentive to honorable ambition! What encouragement to genius in poverty; to talent God-given, though untrained by collegiate hands; to intellectual diamonds buried in every state of this Union, yet capable of resurrection and polish by that self-energy and industry which ever rub off dross and develop innate lustre.

How does the lustrous life of this yankee youth illustrate the old and maligned south! With what light does it shine on the page of her history, exhibiting to impartial generations and nations that our fathers were never a hand's breadth behind their children in welcoming to homes and hearts all who came to dwell beneath her sun—to honor and elevate to office and emolument the men who deserved

them! How completely does this light disperse the clouds and scatter to the winds the imputation on our ancestors that ancestral blood was the road to fortune and fame in their midst, and that a southern aristocracy sat enthroned in the southern heart and dominated its pulsations and dictated its preferments!

What a ray of hope does the twilight of this protracted life throw cheeringly upon the trustful heart of every Christian mother! With what confidence in the promise of God may she not send forth hereafter, in the sweet light of this experience, her wandering boy, with the Bible in his hands and a mother's prayer lingering around his heart!

Oh! the omnipotent power of sanctified prayer! who shall limit its height, its breadth, its length? The spark of faith kindled in a young soul by the parting glance of a mother's loving eye, may flicker long unseen under the bushels of worldliness, ambition and sin, but if followed and fed by such prayer, it is never, it never can be, extinguished!

In the last conversation I had with Judge Warner, about a week before his death, when he saw the end in full view, and almost immediate, I said to him: "You know, judge, whom to trust in this emergency." The reply of the dying man was: "I do. You know I have been long a believer in the religion of Christ."

I did know it, for often in this room, when his health was good, we had conversed on the subject, compared with which law, honor, earthly emolument and glory sink into insignificance. Gentlemen, the sanctified prayer of that mother followed this man to his grave. The breast which nourished his helpless infancy was the instrument in God's hands to administer comfort in the feebleness of age, and solace and hope in the hour and agony of death.

Lumpkin, Warner, Nisbet, the last of these Roman triumvirs is gone!

Illustrious triumvirate, founders of the jurisprudence of Georgia, farewell! Pioneers of a great work, they have done it well. Strongly and deeply the foundations are laid. The arch on which the structure of our written law rests, reposes on three noble columns, each unique and dissimilar, yet blending into harmonious unity. Corinthian, Gothic, Doric, what a strong and beautiful composite they made! Revering each, and detracting from neither, it affords me peculiar pride as one of the democratic minority of the legislature of 1845, to whom was accorded the privilege of placing one of the columns there, and who by voice and vote contributed to make the Gothic column bear forever the name of Warner, to know that I but echo the sentiment of all Georgia when I say that in the support to that arch which he gave he was second to none.

Let the memoir be spread on the minutes of the court.

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- Elect, state not forced to, indictment alleging "five up or other game of cards." Ibid.
- 11. Gaming house, indictment need not describe further than in county. Dohme vs. State, 339.
- Gaming house, keeping of, and renting rooms for purpose, both charged, general verdict sufficient. *Ibid*.
- 13. Bastardy, what necessary to convict of. York vs. State, 551.
- 14. Bond to appear before superior court given and preliminary trial waived not amount to demand and refusal of bond to support. *Ibid*.
- Bond to support, refusal of, not relieved by offering in superior court. Ibid.

- 16. Bond to support, can any other than magistrate take? Ibid.
- 17. Assault with intent to murder, on trial for, need not charge on assault and battery. Washington vs. State, 570
- 18. Principal in second degree, facts of this case make. Ibid.
- 19. Drunkenness, voluntary, no excuse for crime. Hanvey vs. State, 612; Moon vs. State, 687.
- 20. Weapon used in usual manner to produce death, intention to kill presumed. *Ibid*.
- 21. Aliter, if used in some other way. Ibid.
- 22. Words, threats or gestures not justify homicide. Ibid.
- 23. Accomplice, acts and sayings of, both in perpetration and concealment, admissible. Byrd vs. State, 661.
- 24. Confession to employer on statement that there was a probability of settlement, inadmissible. *Ibid*.
- 25. Incest, certain force or power used not amounting to rape.

  Raiford vs. State, 672.
- Malice defined in language of Code not error. Moon vs. State, 687.
- 27. Rape, child swears committed, testimony conflicting, verdict of assault with intent to, upheld. Jones vs. State, 760.
- 28. Intent is question for jury. Russell vs. State, 785.
- 29. Scar voluntarily exhibited in statement, defendant required to show to physician in rebuttal. Gordon vs. State, 814.
- 30. Weapon likely to produce death, must be proved in assault with intent to murder. Paschal vs. State, 818.
- 31. Larceny of things attached to realty, after detaching. Beall vs.. State, 820.
- 32. Larceny and trespass distinguished. Ibid.
- 33. Surplusage, burglary of railroad depot, allegation of incorporation is. Crawford vs. State. 822.
- 34. Larceny, possession of goods shortly after, sufficient to convict. *McAfee vs. State*, 823.
- 35. Lottery, act of 1877 concerning, constitutional. Evans vs. State, 826.
- 36. Retailing without license, indictment need not charge to whom sold. Carter vs. State, 826.
- 37. Venue proved like other facts. Day vs. State, 827.
- 38. Venue, failure to prove, should it not be made distinct ground of motion? Quare. Ibid.
- 39. Autre fois convict, plea of, what necessary in. Wilson vs. State, 827.
- 40. Statute of limitations suspended by escape and concealment. Watkins vs. State, 832.
- 41. Escape before or after arrest suspends statute. Ibid.
- 42. Rape, assault with intent to facts sufficient to show, Ibid.
- Owner of stolen property alleged as J. W. P., proved as "Col. P.," sufficient to support verdict. Robinson vs. State, 833.

- 44. Burglary, intent to steal \$30.00 alleged, sufficient. Hillsman vs. State, 836.
- 45. Description of thing to be stolen, is any necessary? Quare. Ibid.

See Injunction, 1; Evidence, 56.

# CUSTOM. See Landlord and Tenant, 10.

#### DAMAGES.

- 1. Actual only recoverable for breach of contract. Goins et al. vs. W. R. R. of Ala., 190.
- 2. Passenger informed she could not ride on ticket, and leaves, suit is on contract. *Ibid*.
- 3. Peculiarly question for jury. Thorpe vs. Wray, 559; Geo. So. R. R. vs. Neel, 609.
- 4. Amount not excessive (\$9,000.00). Atlanta, etc. R'w'y. vs. Tanner, 384; (\$1,750.00), Geo. So. R. R. vs. Bigelow, 219.
- 5. Obstructing sidewalks, damages for injury from. Maddox & Rucker vs. Cunningham, 431.
- Cotton negligently placed on sidewalk by warehousemen, damages for injury. 1bid.
- Value of services not proved, still verdict for injury, pain and general depreciation of power to labor. Geo. So. R, R. vs. Neel, 600.
- 8. Excessiveness of damages, Supreme Court slow to consider, under general assignment of contrary to law, etc. *Ibid*.
- 9. Live stock, damages not connected with running of trains released by contract. Mitchell vs. Geo. R. R., 644.
- Baggage accompanying passenger with ticket over through line, liability of roads discussed. Wolff vs. Central R. R. 657.
- 11. Measure of damages: Cotton bought of warehousemen and re-sold, deficit in amount delivered accounted for to second purchaser by first at advanced price, warehouseman liable therefor. Beall vs. Rust, 774.
- 12. Measure of, on breach of warranty of seed. Butler vs. Moore, ex'x, 780.
- 13. Prospective profits not recoverable. Ibid.
- 14. Interest on loss may be added to increase aggregate of damages. W. & A. R. R. vs. McCauley, 818.
- 15. Breaking close wrong, retention also, and damages for. Norfleet & Jordan vs. Vaughn et al., 830.

See Master and Servant, 7-9; Laws 1; Railroads 17. 31; Injunction 15; Municipal Corporation, 2; Telegraph Companies, 7-12; Contracts, 19, 21; False Imprisonment, 1, 2; Landlord and Tenant 1; Fence, 3, 4; Practice in Supreme Court 12, 14, 19.

DARIEN. See Pilots 1, 3; Constitutional Law 4.

## DEBTOR AND CREDITOR.

- Preference between creditors, debtor has right of. Princeton Mfg Co. vs. White, 96.
- A signment in New York carried title to debt due assignor in Georgia. *Ibid*.
- Garnishment on Georgia debtor after assignment catches nothing. *Ibid*.
- 4. Land placed with a creditor to sell, pay debt and turn over excess, bound to use diligence. Bullard vs. Jones, adm'x, et al. 472.
- 5. Creditor liable, and for benefits, and entitled to expenses. Ibid.
- Sale of land by creditor for less than debt with knowledge of debtor, is circumstance to show understanding of letter. Ibid
- Liable both for part payment on land made under sale not consummated, and also for rents and profits, creditor not. *Ibid*.
- Insolvent trader's act of 1881, statutory remedy; must show insolvency, and that injunction, etc., would benefit complainant. Collins vs. Myers & Marcus, 530.
- Insolvency, non-payment of claim not show, where large assets shown. Ibid.
- Mortgages on realty enough to consume, if complainant not interested in or attacking same, receiver for realty useless. Ibid.
- 11. Insolvent debtor, voluntary deed of, void against creditors-Cothran, trustee, vs. Forsyth, adm'r, 560.
- 12. Insolvent debtor, deed to hinder or delay creditors, known to grantee, void. *Ibid*.
- Voluntary conveyance when considerably in debt, onus on person taking to show valid. Ibid.

See Constitutional Law, 1; Principal and Agent, 4-5; Evidence, 1; See Partnership, 9; Deed, 2-3.

# DECLARATION. See Judgments, 35.

#### DEDICATION.

- 1. School-house dedicated to public, latter, through school authorities, stands as purchaser. Chapman vs. Floyd, 455.
- 2. Inconsistent dedication by state with one already made, not presumed. Wood et al. vs. Macon & B. R. R. et al., 539.
- Cemetery, railroad allowed to pass over part unsuitable for graves. Ibid.

See Service, 3; Claim 3; Practice in Supreme Court, 15.

#### DEED.

- 1. Reformed except against bona fide purchasers without notice. Lowe, adm'x, vs. Allen, 225.
- 2. Creditor with debt before deed but judgment after, not bona fide purchaser. Ibid.

- 3. Record, failure to, or attestation by one witness, not postpone deed to junior judgments. *Ibid*.
- 4. Covering Alabama land, "buildings, outhouses," etc., admissible, though building was in river and most of property in Georgia. Cook vs. Winter, et al., 259.
- 5. Construction for court. Goldsmith vs. White, 334.
- Construction not limited to exact direction of lines, but grantor's meaning reached from entire description, including termini of lines. Ibid.
- Construction under facts of this case varying direction of line. Ibid.
- 8. Road, holder of in severalty, also holding adjoining land in common, on division, line agreed to run from the road to another point, means from edge of road. Summerville Mac., etc.. Road Co., vs. Baker, 412.
- Road, whether held absolutely or for certain purposes, immaterial. Ibid.
- Adversely held land, prior to 1859, deed to void. Chapman vs. Floyd, 455.
- 11. Act of 1859 not retroactive. Ibid.
- Record where land lies necessary to admissibility; record elsewhere insufficient. *Ibid*.
- 13. Mistake in describing lot corrected. Swatts et al. vs. Spence, adm'r, 406.
- 14. Mistake immaterial, if lot of equal value described and sold for grantee's debts. *Ibid*.
- 25. Trust to pay debt, with absolute title on condition of so doing, created by this deed. Featherston et al. vs. Richardson, adm'r, 501.
- 16. Records, copy from, what necessary to introduction in evidence. Williams vs. Moore & Watkins, 585.
- 17. Preliminary proof in discretion of court. *Ibid*.
- .18. Attestation shows in body that witness is commissioner for Ga. in N. Y., signing "commissioner for N. Y." not invalidate. *Ibid*.
- 19. Mortgage and deed distinguished. Cully vs. Blooming dale, Rhine & Co., 756.
- 20. Sheriff's deed as title not alone good. Parker vs. Martin et al., 453; Beck vs. Bower, adm'r, 738.
- 21. Color of title. sheriff's deed good as. Hammond & Hinson vs. Crosby & Co., 767.
- 22. Quit-claim good as color of title. Ibid.
- 23, Void as title for usury, deed enforceable as equitable mortgage.

  Bullard vs. Long et ux, 891.
- 24. Line established by seven years' acquiescence. Cleveland vs. Treadwell, 835.
  - See Evidence, 8, 26; Equity, 12; Fraud, 3; Debtor and Creditor, 11, 12.

## DISTRESS WARRANT.

- Counter affidavit that sum claimed is not due, sufficient. Girtman vs. Stanford, 178.
- Counter affidavit dismissed, case out of court, no further judgment. Ibid.
- 3. Mesne, process becomes, on filing counter affidavit. Rutherford, adm'r, vs. Rountree et al., 725.
- 4. Bankruptcy discharges. Ibid.
- 5. Discharge of principal in replevy bond discharges surety. *Ibid*.
- 6. "Justly indebted," equivalent to stating debt is due. Wright vs. Hawkins, 828.
- 7. Counter affidavit that part not due, sufficient. Ibid.
- 8. Rent due, statement of removal is surplusage. Ibid.

### DOUGLAS COUNTY.

- 1. Commissioners under act of 1870 subject to mandamus. Polk et al., commissioners, vs. James, ord'y, et al, 128.
- Authority of board of commissioners to proceed with this mandamus repealed by act of 1881. Ibid.

# DRUNKENNESS. See Criminal Law, 19.

# EJECTMENT.

- 1. General verdict for premises carries unsevered crops. Craig vs. Watson, 114.
- 2. Assumpsit for crops under contract before ejectment verdict, not maintainable. *Ibid*.
- 3. Strength of own title, plaintiff must recover on. Parker vs. Martin et al., 453.
- 4. Onus shifted by sheriff's deed with proof of title or possession in defendant; aliter of deed alone. 453; Beck vs. Bower et al., adm'rs, 738.
- Homestead, deed to, made by head of family, suit under defended on behalf of beneficiaries. Hall vs. Mathews, et al., 490.
- Homestead not recovered against head of family individually; this would sever family. Ibid.
- Estoppel on part of head of family by making individual deed, none. Ibid.
- 8. Verdict "for plaintiff" means for premises, and is not void. Johnson vs. Jones et al. 825.
- Prior possession, recovery on, against intruder. Ibid. See Contracts, 13; Deed, 8, 9.

#### ELECTION. See Abatement, 1; Sales, 2.

# EMINENT DOMAIN. See Cemetery, 1-3.

# EQUITY.

- Multifarious, bill not because all parties not interested in all matters; what sufficient. Blaisdell et al. vs. Bohr, 56.
- 2. Purloined and used without knowledge of owner, charge that stock has been, implies want of authority. *Ibid*.
- 3. Criminal proceeding, no injunction against. Garrison et al. vs. City of Atlanta, 64.
- 4. Administration, equity is slow to take from hands of administrator and court of ordinary. Johnson et al. vs. Holliday, adm'r, et al., 81.
- 5. Contract is merged in decree for specific performance. Cunningham et al. vs. Schley et al., 105.
- 6. Set aside, contract and decree will not be, at instance of party taking it, for non-compliance and insolvency. *Ibid*.
- 7. Consent decree is not a subject for bill of review. Ibid.
- 8. Issues, more fully submitted, if desired, counsel should ask. Obear, ex'r, et al. vs. Gray, 182.
- Marshal assets, on bill to, equities of creditor inquired into, though one claim in judgment. Merritt vs. Gill, adm'r, 209.
- Sign notes, to be signed on condition, bill to require on compliance with condition. Blance vs. Goodnow, 264.
- 11. Tax, judicial interference with collection, when proper. S. W. R. R. vs. Wright, comp. gen'l, et al., 311.
- 12. Cancel sheriff's deed under void judgment, equity will. Graham et al. vs. Hall, 354.
- Trust, direction as to management and claims against, subject of equity. Mechanics', etc., B'k et al. vs. Harrison, ex'r, et al., 403.
- 14. Non-suit, none in equity; dismissal for want of evidence. Sandeford vs. Lewis et al., 482.
- 15. Dismissal called non-suit, not require reversal. Ibid.
- 16. Clean hands and without laches, suitor must be. Ibid.
- Dismissal right, bill filed by creditor to recover for improvements, after sale and distribution of money at his instance.
   Ibid.
- 18. Mistake in deed describing wrong lot, corrected. Swatts et al. vs. Spence, adm'r, 496.
- Mistake immaterial, if lot conveyed of equal value sold and applied to grantee's debts. *Ibid*.
- Trust to pay debt and absolute title on so doing; on failure, bill to set aside will lie. Featherston et al. vs. Richardson, adm'r, 501.
- 21. Misapplication of funds also here alleged. Ibid.
- 22. Administrator of grantor could file bill, on his death. Ibid.
- Equitable relief, complicated cross claims make proper case for. Beall vs. Rust, 774.



24. Full relief granted on bill filed to enjoin non-resident plaintiff.

1bid.

See Injunction; Trusts and Trustees, 12-14; Verdict, 10; Fraud, 3-4; Retraxit, 1; Deed, 1-3; Homestead,6; Jurisdiction, 1.

### ESTATES.

- I. Devise to children and to descend to grandchildren, if any children die without heirs, share to be divided among others, created life estate with remainder. Jones vs. Crawley et al., 175.
- 2. Fee simple defeasible on dying without children, devise which creates. Gibson et al. vs. Hardaway et al., 370.
- 3. Entail property, terms of this will did not. *Ibid*. See *Injunction*, 3; *Title*, 1, 2.

#### ESTOPPEL.

- I. Factors inducing landlord to rent by promising not to interfere with collection of rent, estopped from so doing. Crine & Daniel vs. Davis, receiver, 138.
- 2. Administrator estopped from attacking deed of intestate. Hall, adm'r. vs. Armor et al., by next friend, 449.
- Homestead, suit for under deed from head of family, not estopped from defending on behalf of beneficiaries. Hall vs. Mathews et al., 490.
- Admission in judicio: Bill to enjoin f. fa., alleging joint interest in debt, estops subsequent affidavit of illegality alleging complainant to be surety. Crusselle vs. Reinhardt, adm'r. 619.

# EVIDENCE.

- Items of account, vendor not knowing at time of sale, but agreeing with vendee afterwards, may testify to. Gordon vs. Mitchell, 11.
- 2. Irrelevant, books being, though produced under notice, not admissible. Gow et al. vs. Charlotte, etc., R. R. Co., 54.
- 3. Administration, want of, shown by parol. Cowan vs. Corbett et al., 66.
- 4. Onus, when shifted. Cleghorn vs. Janes, 87.
- 5. Witness against witness, question for jury. Ibid.
- 6. Sayings of wife on furnishing money to agent to buy husband's property at tax sale provable. Belcher vs. Black et al., for use, 93.
- 7. Value of stock at given time sought, value shortly before provable. Hunt vs. Hardwick & Co., 100.
- 8. "Ferrell" in plat, "Terrell" in grant, explainable by parol. Ferrell et al. vs. Hurst et al., 132.
- Return of land-drawing admissible, to show which was returned. Ibid.

- Hearsay, testimony appearing to be on cross-examination, ruled out. Obear, ex'r, et al. vs. Gray, 182.
- Decree being claimed as discharge of debt, record admissible, Merritt vs. Gill, adm'r, 209.
- 12. Engineer, negligence in issue, duties provable. Augusta, etc. R. R. vs. Dorsey. 228.
- 13. Instructions, compliance with provable. Ibid.
- 14. Model of machinery, notice of making not necessary. Ibid.
- 15. Stop, ability to, being in question, expert could tell what had been done under more difficult circumstances. *Ibid*.
- Dispatch generally required of employés, inadmissible as to diligence of particular employé. *Ibid*.
- 17. General duties provable in absence of specific instructions. *Ibid.*
- Negligence being vital issue, evidence concerning excluded, new trial. *Ibid*.
- 19. Hearsay inadmissible. Ibid. (Cothran, trustee, vs. Forsyth, adm'r, 560.)
- 20. Amendment, why not originally so alleged, immaterial. Ibid.
- 21. Statements to counsel of reasons, immaterial. Ibid.
- 22. Record, including brief of evidence, admissible to show how court arrived at construction of verdict. Harvey vs. Head, 247.
- 23. Deed covering Alabama land, "buildings, outhouses," etc., admissible, though mill was in river and most of property in Georgia. Cook vs. Winter et al., 259.
- 24. Indorsement not changed to acceptance by parol evidence. Perry vs. Bray & Keel, 293.
- 25. Tax digest admitted in rebuttal of statement as to manner of giving in tax. Kennedy, adm'r, vs. Redwine, 205.
- 26. Metes and bounds, deed conveys by, certain land shown not to be in. Goldsmith vs. White, 334.
- 27. Parol, new stipulation not grafted on mortgage by. Chamberlin vs. Beck, Gregg & Co. et al., 346.
- 28. Location of residence of defendant as to district lines shown by parol, on question of jurisdiction. Graham et al. vs. Hall 354.
- 29. Re-arrest shown in suit for false imprisonment. Thorpe vs. Wray, 359.
- Reason for pleading guilty shown, fact being proved to impeach witness. Ibid.
- 31. Res gestæ of arrest, circumstances attending and offer to give bond, inclu ded. Ibid.
- 32. Guardian's return, prima facie evidence only. Lewis, ex'r, vs. Allen, adm'r, 398.
- 33. Pleadings, allegations in, invoked to dispense with proof.

  Wood et al., vs. Isom et al., 417.

- 34. Claim interposed to administrator's sale of property adversely held, invalidity of title immaterial. Hall, adm'r, vs. Armor et al., by next friend, 449.
- 35. Appraisement likewise immaterial. Ibid.
- Deed, record where land lies necessary to admissibility. Chapman vs. Floyd, 455.
- 37. Ancillary to deed, evidence inadmissible if deed is so. Overby vs. Hart, 493.
- 38. Entries on execution docket made in presence and under order of plaintiff, admissible on issue of payment. Swatts et al., vs. Spence, adm'r, 496.
- Trust, nature of proved, to show whether necessary to borrow money therefor, borrowing being issue. White vs. Fulton, 511.
- 40. Preponderance sufficient in civil cases. Ibid.
- 41. Understanding of witness as to settlement, with facts on which based, admissible. Neal, rec'r, vs. Field, 534.
- 42. Understanding, was it admissible without facts? Quære. Ibid.
- 43, Intention of another, witness cannot state without reason therefor. Cothran, trustee, vs. Forsyth, adm'r, 560.
- 44. Copy deed from record, what necessary to use. Williams vs. Moore & Watkins, 585.
- 45. Diagram proved, admissible; conflict as to correctness not cause rejection. *Moon vs. State, 687.*
- Diagram of scene of murder, red lines not make inadmissible. Ibid.
- 47. Bullets taken from body admissible.
- 48. Conclusion of witness, without facts, inadmissible. *Ibid*.
- 49. Positive outweighs negative. Ibid.
- Partnerships, not established by sayings of one party. Flournoy & Epping vs. Williams, 707.
- 51. Sayings ex parte, inadmissible in speaker's favor. Ibid.
- 52. Cash items large, merchant's books inadmissible to prove. Beall vs. Rust, 774.
- Aliter as to bankers, etc., where such items are in line of business. Ibid.
- 54. Identification of person or thing, opinion and facts on which based, admissible. Wiggins vs. Henson, 819.
- 55. Parol, new conditions not added to written contract by. Stripling vs. Holton, 821. (See No. 57.)
- 56. Statements of person assaulted, after occurrence, inadmissible; aliter, if in presence of defendant. Jesting vs. State, 824.
- 57. Fraud, etc., in procuring written contract pleaded and proved by parol. Ham vs. Parkerson et al., 830.
- 58. Note under seal admissible unless non est factum pleaded.

  Hayes vs. Hamilton, agent, 833.

59. Deceased witness, testimony at committing trial proved by parol. Robinson vs. State, 833.

See Witness; Interrogatories; Partnership, 11; New Trial, 7; Debtor & Creditor, 6; Judgments, 25; Bankruptcy, 9; Criminal Law, 29; Process, 3.

#### EXECUTION.

- Partnership, judgment against, f. fa. against firm and individuals, variance is fatal. Clayton & Webb vs. May, 27.
- 2. Re-levy, no order necessary, f. fa. being in sheriff's hands to claim fund. Zachry vs. Zachry, 158.
- 3. Variance between f. fa. and judgment must be material as ground of illegality. *Ibid*.
- 4. Variance material, f. fa. quashed or rejected from evidence.

  Moughoun et al. for use, vs. Brown, 207.
- 5. Variance not material between M. and N., surviving executor and executrix for use, and M. and N. for use. *Ibid*.
- 6. "Make" a certain sum, direction in mortgage fi. fa. to, includes sale. Chamberlin & Co. vs. Beck, Gregg & Co. et al., 346.
- 7. Returnable at next term after money can be made. Ibid.
- 8. Control f. fa., purchaser without notice from holders of bond for title may buy f. fa. for purchase money against his vendors. Crusselle vs. Reinhardt, adm'r, 619.
- 9. Defaulting tax collector, execution on bond. County of Lee vs. Walden, adm'x, 664.
- 10. Bond, none given, execution based on, not good. Ibid.
- 11. Variance of three cents immaterial. McMichael, adm'x, vs. Hardee, 831.

See Contracts, 22-24; Estoppel, 4; Judgments, 35; Arbitrament and Award, 13; Constable, 1,3; Evidence, 38.

#### EXECUTOR. See Administrators and Executors.

FACTORS. See Estoppel, 1; Equity, 23; Evidence, 52, 53; Damages, 13.

### FALSE IMPRISONMENT.

- Warrant, unlawful detention under, in bad faith, actionable. Thorpe vs. Wray, 359.
- 2. Warrant void, trespass will lie. Ibid.
- 3. Re-arrest proved to show mala fides. Ibid.
- 4. Prosecution ended before suit, does rule apply to trespass for arrest and imprisonment? Quare. Ibid.

#### FENCE.

 Defined by law; not vary for different animals. Hamilton vs. Howard, 288.



- 2. Average of places too high and too low not taken. Ibid.
- 3. Hogs, that fence keeps out others, not justify trespass. Ibid.
- Damage to crops not set-off against trespass on stock, if fence not legal. Ibid.

FILING. See Judgments, 35.

FIXTURES. See Landlord and Tenant, y.

## FORCIBLE ENTRY AND DETAINER.

1. Force or show of, necessary. Coker vs. McKinney, 289.

# FRAUD.

- Representations derived from common agent of vendor and vendee and so known to be, though false, not avoid trade. Hunt vs. Hardwick. 100.
- Election to retain or rescind trade, vendee must make at once on discovering fraud. Ibid.
- 3, Weakness of mind, advantage taken of, conveyance set aside.

  Wood et al. vs. Isom et al., 417.
- 4. Scripture invoked to effect compromise, not necessarily fraud. *Ibid*.
- 5. Presumed, fraud in acquiring possession of land, not. Hall vs. Gay, 442.
- 6. Plea of fraud must allege facts, not conclusions. Napier, ex'r, vs. Central Ga. Bank, 637.
- 7. Prescription, fraud to defeat, must affect prescriber. Hammond & Hinson vs. Crosby & Co., 767.
- 8. Deed obtained by fraud void. Carter vs. Pinkard, 817,
- o. Notice of fraud, purchaser with, gets no title. Ibid.

See Debtor and Creditor, 11-13; Homestead, 3, 4; Husband and Wife, 1; Statute of Limitations, 6.

FUTURES. See Contracts, 4-7, 15; Telegraph Companies, 11, 12.

### GARNISHMENT.

- Assignment for creditors in New York carries debt in Georgia, and subsequent garnishment catches nothing. Princeton Mnf'g'Co. vs. White, 06.
- 2. Answer in ten days in justice court, garnishee served Dec. 2d. 1880, relieved from, by act of Dec. 6th. Willis vs. Fincher. 444.
- 3. Answer, exceptions to, too late after thirty days. Ibid.
- 4. Justice courts, since 1880, law as in other courts. Arnold vs. Gullatt, 810.
- 5. Judgment against debtor necessary before judgment against garnishee. *Ibid*.

GEORGIA. See Deed, 4.

GEORGIA RAILROAD. See Railroads, 41.

GRANT. See Evidence, 8.

#### GUARDIAN AND WARD.

- 1. Confederate money investment without order, except in state securities, after January 1st, 1863, guardian liable. Venable vs. Howard, ord'y, for use, 167.
- Party, executor of guardian is proper, on his death pending suit for board bill of ward. Lewis, ex'r, vs. Allen, adm'r, 308.
- 3. Returns only prima facie evidence against guardian. Ibid.
- 4. Receipts in final settlement acquiesced in for four years, prima facie binding; onus to overcome. Steadham et al. vs. Sims, 741.
- Settlement out of court, guardian must inform ward; not always necessary to make detailed statement. *Ibid.* See Trusts and Trustees, 1.

## HABEAS CORPUS.

- Discharge prisoner on any terms, can court below, pending exception? Quære. McLendon, sh'ff, for use, vs. Smith et al., 36.
- 2. Bond given to sheriff "to render his body in prison in execution of the order remanding him," under attachment against attorney, in case of affirmance, no recovery on. *Ibid*.
- 3. Child, father not entitled to as matter of right; question of discretion. Smith vs. Bragg, 650.
- 4. Reviewing court not finally adjudicate facts on certiorari from habeas corpus. Ibid.
- Minor wife, custody of, by parent or husband, in discretion of court. Gibbs vs. Brown, 803.

HALL COUNTY. See Costs, 8.

HOGS. See Fence.

# HOMESTEAD.

- 1. Partnership assets, exemption in. Blanchard, Williams & Co. vs. Paschal, 32.
- Severance after levy by firm creditor not prevent exemption of partner. Ibid.
- Capital all withdrawn, not alone prevent exemption; fraud necessary. Ibid.
- 4. Assets, large amount of held by firm shortly before application for exemption by partner, onus to account for. Ibid.

- 5. Waiver, \$300.00 not subject to, must be specially set apart by ordinary. Sasser et ux, relators, vs. Roberts, sheriff, 252.
- Husband dying pending caveal, bill lies by wife and children against purchaser with notice. Hodges et al. vs. Hightower et al., 281.
- 7. Attorney signing petition, applicant verifying, not void. Roberts vs. Cook, sheriff, et al., 324.
- 8. Age of wife, failure to allege, not make void. Ibid.
- Beneficiaries sufficiently stated, by allegation that application is as head of family and naming family. *Ibid*.
- Presumption that ordinary did his duty in mailing notices to non-resident creditor. *Ibid*.
- Surveyor's return dated on day of hearing, gives ground for time; not make proceeding void. *Ibid*.
- 12. Husband applying, failure to allege out of whose property carved, not avoid. Mc Williams vs. Mc Williams, 459.
- 13. Presumption that it belonged to head of family. Ibid.
- 14. Presumption strengthened here by allegation that applicant lived on place. *Ibid*.
- Terminated, not, till all beneficiaries cease to be such. Hall vs. Mathews, 490.
- Terminated, not on death of wife leaving dependent grandchild.
   Ibid.
- 17. Title, individual deed from head of family carried none. Ibid.
- 18. Ejectment against maker defended on behalf of family. Ibid.
- 19. Trust, homestead in nature of. Wilson vs. Rogers et al., 549.
- Subject, pleadings to, must show grounds and beneficiaries.
   Ibid.
- 21. Illegality, too late to raise point by, in this case. Ibid.
- 22. Void for want of notice to creditor, second setting apart as to him allowed. Wheeler & Wilson M'f'g Co. vs. Christopher, 635.
- 23. Recovery, no exception to limitation in act of 1876 on account of fraud. Rowan, guardian, vs. McCurry et al., 7,32.
- Trespass for wrongful levy maintained by wife or family, without joining husband. Mc Williams et al. vs. Anderson, 772.
- 25. Notice that part of money loaned was not used to remove encumbrance on homestead, facts charge lender with. Bullard vs. Long et ux., 821.
- 26. Purchase money, homestead under §2040 not subject prior to 1874. Hawks, ex'x, vs. Hawks, 832.

HOMICIDE. See Master and Servant, 7.

#### HUSBAND AND WIFE.

 Wife with separate estate buying property of husband at tax sale, not alone make sale fraudulent. Belcher vs. Black et al., for use, 93.

- 2. Sayings of wife on furnishing money provable. Ibid.
- 3. Married women suable as to separate estate. Francis vs. Dickel & Co., 255.
- 4. Partners, can husband and wife be? Quære. Ibid.
- 5. Property, husband might permit wife to buy prior to 1861, and hold against him and volunteers. Gorman et al. vs. Wood, 524.
- Judgment lien attaching to property held in his name, husband could not then set up her equity against bona fide purchaser under fi. fa. Ibid.
- 7. Lien not defeated by then taking deed in her name. Ibid.
- Purchaser under husband bona fide protected, though wife's money used by husband. Ibid.
- Minor wife, custody of by husband or parent in discretion of judge. Gibbs vs. Brown, 803.
- Minor female over fourteen, marriage valid without consent of parents. *Ibid*.
- 11. Homicide of husband by fellow-servant, widow cannot recover against principal unless criminal. McDonald vs. Eagle & Phenix M'f'g Co., 839.

See Homestead, 12; Trusts, 8.

### ILLEGALITY.

- 1. Judgment by default, issuable plea being in, illegality not proper remedy. Tumlin vs. O'Bryan & Bros., 65.
- 2. Statute of limitations not good after judgment. Stiles, adm'r, vs. Elliott, ex'r, 83.
- 3. Variance between judgment and fi. fa. must be material. Zachry vs. Zachry, 158.
- 4. Excessive levy, mere general allegation insufficient. *Ibid*.
- 5. Title not in defendant, no ground of illegality. Ibid.
- 6. Service, no return of, reached by illegality. O'Bryan & Bros. vs. Calhoun, 215.
- Service, return of, remedy by traverse. This included in illegality with officer made party. *Ibid*.
- 8. Errors proper to bill of exceptions not ground for illegality after affirmance. Dahlonega Gold Mining Co. vs. Purdy, 296.
- 9. New grounds added, if not known before. County of Lee vs. Walden, adm'x, 664.

See Estoppel, 4; Practice in Supreme Court, 7, 17; Homestead, 21.

IMPROVEMENTS. See Verdict. 10; Equity, 17.

# INDORSEMENT.

1. Draft, note or check to order, indorsement necessary; else

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transferee must aver and prove consideration. Farris vs. Wells, 604.

See Contracts, 14.

# INHERITANCE. See Title, 1, 2.

## INJUNCTION.

- 1. Criminal proceeding, no injunction against. Garrison et al. vs. City of Atlanta, 64.
- Dead defendant, judgment against, void; injunction unnecessary. Lockridge vs. Lyon, 137.
- Levy on whole estate under fi. fa. vs. life tenant, sale of remainder only enjoined. Jones vs. Crawley et al., 175.
- Claim refused and injunction sought, must show bond good and refusal improper. Ibid.
- 5. Attorney of defendant bound by. Wimpy vs. Phinizy, 188.
- 6. Violation to place other clients in possession after injunction against defendant. *Ibid*.
- 7. Restitution or imprisonment ordered. Ibid.
- 8. Terms of dissolution proper in these cases. Tift vs. Harrell, 291; Gardner vs. Waters et al., 294.
- 9. Refusal right in these cases. Trammell et al. vs. Marks et al.; Sewell vs. Edmondston, 208.
- 10. Judgment on hearing not prevent demurrer for want of equity.

  Mechanics, etc., B'k et al. vs. Harrison, ex'r, et al., 464.
- 11. Railroad, delay in proceeding against, to prevent passing through cemetery, equity slow to interfere. Wood et al. vs. Macon and B. R. R. et al., 539.
- 12. Facts disputed, chancellor has discretion. Ibid.
- 13. Stable, private, erection not enjoined, though near line. Rounsaville et al. vs. Kohlheim, 668.
- 14. Stable, hurtful construction or use enjoined. Ibid.
- 15. Apprehension of injury not cause injunction. Ibid; Bailey vs. Ross, adm'r, et al., 735.
- 16. Harsh remedy, only granted when necessary. Etowah M'f'g, etc., Co. vs. Dobbins & Co. ct al., 823.
- 17. Service, none, unnecessary to enjoin suit. Ibid.
- Agent, want of authority in to make notes, not require injunction. Ibid.
- Payment of notes by substituting others, injunction unnecessary. Ibid.

See Administrators and Executors, 2; Equity, 4.

INSOLVENCY. See Debtor and Creditor, 8-10, 11-13.

## INSURANCE.

1. Risk "about same as before," knowledge inferred. Merchants, etc., Ins. Co. vs. Vining & Bro., for use, 197.

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- Representation of value on information, though false, not avoid policy. Ibid.
- 3. Refusal to pay waives preliminary proofs. Ibid.
- 4. Refusal to pay pending garnishments waives proof during that time. *Ibid*.

### INTEREST AND USURY.

- 1. Deed in 1872 to secure debt and usury, land surrendered absolutely in June, 1873, good. Bullard vs. Jones, adm'x, et al., 472.
- 2. Plea of usury must show what. Trammell vs. Woolfolk, 628.
- 3. Damages may be increased by adding interest. W. & A. R. R. vs. McCauley, 818.
- 4. Deed, usurious, void as title, but enforceable as equitable mortgage. Bullard vs. Long, et ux., 821.
- 5. Accounts by custom due at end of year bear interest from then. Bell vs. Morton, 831.

# INTERROGATORIES.

- Paper not attached to answer to cross-question, if it could not have benefited objecting party, and witness denies having, answers not rejected. Barnhart & Kimbrough vs. Sternberger, 341.
- 2. Answer not full to direct interrogatory, not rejected at instance of other party. *Ibid*.
- 3. Residence of witness must be stated, if known. Mc Williams vs. Mc Williams et al., 450.
- 4. Objection not necessary before commission issued. Ibid.
- 5. Suggestions of court as to same. Ibid.
- 6. Answers to cross-interrogatories refer to answers to direct, sufficient. Geo. R. R. vs. Thomas, 744.

# JUDGMENT.

- 1. Dormant, judgment revived as, dormancy is res adjudicata.

  Dunn vs. Brogden, 63.
- 2. Default, judgment by granted, issuable plea being in, illegality not proper remedy. Tumlin vs. O'Bryan & Bros., 65.
- 3. Remedy, what is proper. Ibid.
- 4. Mortgage, judgment foreclosing, not dormant in seven years. Stiles, adm'r, vs. Elliott, ex'r, 83.
- 5. Dead defendant, judgment against void; remedy, what is. Lockridge vs. Lyon, 137.
- 6. Equities of creditors inquired into on bill to marshal assets, though one in judgment. Merritt vs. Gill, adm'r, 209.
- Deed made after debt but before judgment, creditor not like purchaser, so as to prevent reforming deed. Lowe, adm'x, vs. Allen, 225.



- 8. Deed not recorded, or attested by one witness, not postponed to junior judgment. *Ibid*.
- 9. Amended to declare intention of verdict finding some of lots claimed subject. Moses, trustee, vs. Eagle & Phenix Mfg. Co., 241.
- 10. Amended to declare intention of verdict, after exception and affirmance. *Ibid.* (See 24, 25, below.)
- Construes verdict from pleadings and evidence. Harvey vs. Head, 247.
- Security on claim bond bound by judgment for damages and costs. *Ibid*.
- 13. General judgment for work, not rank as foreclosure of laborer's lien Love vs. Cox, sheriff, et al., 269.
- 14. Res adjudicata, decision on particular case is, though principle reviewed in another case. S. W. R. R. vs. Wright, comp. gen'l, et al., 311.
- Jurisdiction, judgment without, unless waived or appearance and pleading, void. Graham et al. vs. Hall, 354.
- 16. Set-off against each other on motion. Langston vs. Roby et al., 406.
- 17. Set-off of judgments ex delicto and ex contractu. Ibid.
- 18. Set-off, though attorney's lien defeated. Ibid.
- 19. Will admitted to record, binding until set aside. Langston, ex'r, vs. Marks, 435.
- 20. Nullity, judgment being on face, attacked. 1bid.
- 21. Res adjudicata, plea not sustained in this case. Ibid.
- 22. Nullity, justice may disregard judgment as, but not set aside. Chapman vs. Floyd, 455.
- 23. Injunction, judgment on hearing, not prevent demurrer for want of equity. Mechanics', etc., B'k et al. vs. Harrison, cx'r, et al., 463.
- 24. Amended to conform to verdict after execution issued and satisfied. Dison vs. Mason, 478. (See 9-10 above.)
- 25. Amended, must be by record; not by parol proof. Ibid.
- 26. First term, judgment not rendered at, except in cases provided. State vs. Gaskill, 518.
- 27. Valid, would it be against defendant, if rendered by consent? *Ibid*.
- 28. Valid, not against claimant. Ibid.
- 29. Dormant after seven years. Groves, ord'y, for use, vis. Williams, adm'r, et al., 598.
- Dormant, is evidence of debt until expiration of time for reviving. *Ibid*.
- 31. Dormant judgment not alone show devastavit of administrator. Ibid.
- 32. Dormant, nulla bona cannot be entered. Ibid.
- Ordinary's judgment allowing administrator to sell, not collaterally attacked. Bailey vs. Ross, adm'r, et al., 735.

- 34. Covered by former ruling, this case is. Bailey et al. vs. Bailey et al., 823.
- 35. Filing not entered on declaration, service acknowledged and appearance, verdict and judgment cures. Gunn vs. McMichael, adm'x, 826.
- 36. Set aside, not if *laches* in party seeking to. *Hawks*, ex'x, vs. *Hawks*, 832.

See Auditor, 2; Process, 3; Equity, 5; Retraxit, 1; Ejectment, 1,2; Executions, 3-5; Administrators and Executors, 20; Year's Support, 4.

# JUDICIAL COGNIZANCE. See Removal of Causes, 4.

# JURISDICTION.

- Tax f. fa. levied in county of principal office, equity has jurisdiction there to enjoin. S. W. R. R. vs. Wright, comp. gen'l, et al., 311.
- Appearance and pleading waives. Beall vs. Rust, 774.
   See Judgment, 15; Equity, 24; Ordinary, 2; Arbitrament and Award, 1; Evidence, 28.

# JURORS.

- 1. Bailiff stating that they would be kept out a week or made to agree, new trial. Obear, ex'r, et al. vs. Gray, 182.
- Park or place of resort, jury going to and separating, new trial, unless purged. *Ibid*.
- 3. Lot or chance, verdict resulting from, set aside. Ibid.
- 4. Impeach verdict, juror cannot. Ibid.
- 5. New trial granted, jury made from regular panels. Maddox & Rucker vs. Cunningham, 431.
- 6. Objection not made till after verdict, too late. Ibid.
- 7. Excused as sick before panel complete, though sworn in chief. Hanvey vs. State, 612.
- 8. Array, challenge to, must be made when panel put on prisoner; too late afterwards that one name was incorrectly written. *Moon vs. State*, 687,
- 9. Trior, question left to court as, decision final. Ibid.
- 10. Partiality, onus to prove on party alleging; juror may sustain competency. Ibid.
- 11. Partiality, decision of court on, slow to reverse. Ibid.
- 12. Partiality known to counsel not cause new trial. Ibid.
- 13. Sheriff sleeping with juror improper. Jones vs. State, 760.
- 14. Misconduct, onus on state to show no injury. Ibid.
- 15. Liquor, use of by jurors, explained and purged in this case.
- 16. Polling jury, one overlooked, jury discharged, but recalled and



juror polled before leaving presence of court, no new trial. Russell vs. State, 785.

17. Inferences from facts, jury may make. Beall vs. State, 820.

JUSTICE COURTS. See Justice of the Peace.

JUSTICE OF THE PEACE. See Judgment, 22; Appeal, 1, 4; Attachment, 2; Garnishment, 2, 3-5.

LABORER. See Lien. 6.

### LANDLORD AND TENANT.

- Independent covenants to pay rent and repair, failure of latter not forfeit rent; action or recoupment proper. Lewis & Co. vs. Chisholm, 40.
- Repair, failure of landlord to, not work forfeiture unless premises become untenantable. *Ibid*.
- 3. Remedy of tenant. Ibid.
- 4. Repair, duty to, is on landlord. Ibid.
- 5. Ouster of tenant from lawful possession alone, not render landlord liable; must occur through him or by his consent. Perry, adm'r, vs. Wall, 70.
- 6. Counter affidavit to distress warrant that sum was not due, sufficient. Girtman vs. Stanford, 178.
- 7. Possessory warrant lies by tenant against landlord for violent or fraudulent taking. Ivey et al. vs. Hammock, 428.
- 8. Fixtures, tenant may remove while in possession. Young blood & Harris vs. Eubank, 630.
- 9. Fixtures become part of realty if not removed while tenant remains in possession. *Ibid*.
- Custom to allow removal, but no time shown, construed by general law. *Ibid*.
- 11. Removing, tenant in good faith, and subsequently re-renting from another in possession, not render him tenant of old landlord. Wellborn, adm'r, vs. Hood, 824.

See Estoppel, 1; Distress Warrant.

# LAWS.

- Contract of service made in one state, accident in another, which law governs? Quære. Atlanta, etc., Rwy. vs. Tanner, 384.
- If law where injury occurred, mere modes of procedure are excepted. *Ibid*.
- Comity, construction of common law by courts in state of accident accepted. *Ibid*.
- Garnishment, answer in ten days, necessity relieved by act passed after service of summons. Willis vs. Fincher, 444.

- 5. Retroactive, act of 1859 (Code §2695) not. Chapman vs. Floyd, 455.
- 6. Prosecution before recovery for homicide not required in state of accident, not required here. So. Ca. R. R. vs. Nix, adm'r, 572.
- 7. Bonds, act of 1875 did not repudiate, but applied test to. Gurnee, Jr., & Co. vs. Speer, treasurer, 711.

Statute of Limitations, 9; Wills, 5.

### LEGACY.

- 1. Specific, courts not inclined to so construe legacy. Morton vs. Murrell et al., 141.
- General, legacy to equalize children, \$1,500.00 to be raised out of estate before division, is. *Ibid*.
- Adeemed, legacy not, where will stated part of lot was sold to named purchaser and left proceeds to legatee, and trade was rescinded and re-sold. Reed, gdn., vis. Reed, ex. x, 589.
- 4. Adeemed, legacy not by mere proposal of testator to use money, if not consummated. *Ibid*.

# LEVY AND SALE.

- 1. Amended on day of sale, constable's entry may be, without any order. Spencer vs. Fuller & Doolittle, 73.
- 2. Purchaser failing to comply with bid, sheriff may sue or re-sell at his risk. Sharman, sh'ff, for use, vs. Walker, 148.
- 3. Suit for use of all parties interested in fund. Ibid.
- 4. Withdraw fs. fa. in sheriff's hands claiming money, for relevy, no order necessary. Zachry vs. Zachry, 158.
- Excessiveness of levy, mere general allegation not sufficient in illegality. *Ibid*.
- Description by number of lot and district sufficient in this case. *Ibid*.
- 7. Tax fi. fa. for more than \$50.00 not levied by constable in 1873; so levied, sale void. Butler vs. Davis, 173.
- 8. Attachment returnable to justice, court, levy by sheriff is bad. Pearce & Renfroe vs. Renfroe Bro's, 194.
- Real estate, levy on undisposed of, not prima facie evidence of satisfaction. Overby vs. Hart, 493.
- Claim dismissed and levy ordered to proceed, not prevent levy on other realty. *Ibid*.
- Four defendants, levy not stating as whose property levied on, insufficient. *Ibid*.
- 12. Release of one purchaser of part of land from levy, releases other. Manley et al. vs. Ayres et al., ex'rs, 507.
- Release, bond to indemnify against levy and purchase of f.
  fa. by securities, operates as. Ibid.
- 14. Entry of no personalty allowed made by constable after sale,

- and in ejectment thereunder. Williams vs. Moore & Watkins, 585.
- 15. Entry nunc pro tunc is not amendment so as to vitiate sale.

  1bid.
- 16. Combination to reduce price at sale, illegal. *Ibid*.
- 17. Joining interests and bidding together not illegal. Ibid.
- 18. Vendor giving bond for title, title remaining in him is subject. Hardce vs. McMichael, adm'x, 678.
- 19. Entry of "no personalty" by constable once, sufficient to warrant levy on realty. Beck vs. Bower et al., adm'rs, 738.
- No personalty "entered, horse pointed out by defendant and sold, levy on realty proper without more. Ibid.

See Contracts, 22-24, 25-27; Homestead, 2; Injunction, 3, 4; Title, 13.

#### LIBEL.

- 1. Malice, want of, may mitigate damages; not authorize verdict for defendant. Shipp vs. Story, 47.
- 2. Words, whether libellous, is for jury. Beazley et ux. vs. Reid et al., 380.

See Slander.

LICENSE. See Pilots, 1, 3; Municipal Corporations, 3-5.

#### LIENS.

- 1. Laborer, general or special lien of, must be enforced as such. Love vs. Cox, sheriff, et al., 269.
- 2. Recorded as to realty. Ibid.
- General judgment for work postponed to senior judgment, though latter rendered since work done. Ibid.
- 4. Description, impossibility not required as to accuracy. Ibid.
- 5. Realty and personality, lien on, separately enforced. Ibid.
- Laborer, what allegation in affidavit sufficient. (Crawford, J. dissenting.) Richardson et al., vs. Langston & Crane, 658.
   See Attachment. 1.

LIS PENDENS. See Abatement, 1; Notice, 5.

LIVE STOCK. See Railroads, 31, 32, 42-44.

### MACON AND BRUNSWICK RAILROAD.

- 1. Sale of by estate valid. Wood et al. vs. Macon & B. R. R. et al., 539.
- Lease of and right of present company to construct road from Macon to Atlanta. Ibid.
- 3. Cemetery at Macon, right to pass through. Ibid.

# MALICIOUS PROSECUTION. See False Imprisonment.

MANDAMUS. See Treasurer, 1-3.

# MASTER AND SERVANT.

- 1. Employment for five months, payable monthly, servant decharged, may sue each month. Isaacs vs. Davies, 169.
- 2. Instructions, specific, control; if none, general duties control Augusta etc., R. R. vs. Dorsey, 228.
- 3. Comity in applying law of state of injury. Atlanta d... Rwy. Co. vs. Tanner, 384.
- 4. Railroad employés, right of recovery when free from neglegence; aliter, if not. Geo. So. R. R. vs. Neel, by Baker vs. W. & A. R. R., 699. (Compare Atlanta, d., Rwy. Co. vs. Tanner, 384.)
- 5. Tools, knowingly using defective, no recovery. Ibid.
- 6. Superior servant, command of to use tools, not cause recovery *lbid*.
- Homicide by fellow-servant, unless murder or manslaughte no recovery by widow. McDonald vs. Eagle & Phenix Mf Co., 839.
- Fellow-servant, master not liable for negligence of, undengligent in selecting, or keeping him after knowledge. It
- General superintendent, workman in charge of derrick witwo or three others is not. *Ibid*.

See Criminal Law, 1; Witness, 6; Lien, 1-5.

# MCINTOSH COUNTY. See Constitutional Law, 4.

#### MORTGAGE.

- 1. Rule nisi to foreclose may be waived. Stiles, adm'r, 3. liott, ex'r, 83.
- 2. Affidavit to foreclose on personalty made before clerk, and fa. issues without order. Chamberlain & Co. vs. B. Gregg et al., & Co., 346.
- Two debts to different creditors secured by same mortg may be foreclosed as to both at once. *Ibid*.
- 4. "Make" a specified sum, direction in mortgage ft. fa includes direction to sell. *Ibid*.
- Distinguished from deed. Culley vs. Blooming dale, Rhin Co., 756.
- 6. Year's support prevails against mortgage. Ibid.
- 7. Trust estate, chancellor cannot grant power to mortgag chambers. (Jackson, C. J., dissenting.) Iverson at a Saulsbury, Respess & Co., 790.

See Statute of Limitations, 1, 3; Debtor and Creditor

#### MUNICIPAL CORPORATIONS.

- 1. Creature of legislation and subject to change. Churchill et al. vs. Walker et al., 681.
- 2. Police officer, city not liable for tort of. Attaway vs. Mayor, etc., of Cartersville, 790.
- Bind successors to given policy or prevent change of license fees, council cannot. Williams vs. City Council of West Point, 816.
- 4. License entitles holder to privileges conferred. Ibid.
- License, cost of lowered, holder cannot repudiate and recover amount paid. Ibid.,
- 6. Street, negligence in not repairing, causing injury, sufficiently alleged here. Trippe vs. City of Atlanta, 834.

See Streets and Sidewalks; Cemetery, 3; Tax, 1, 2; Constitutional Law 1, 3, 4; Criminal Law, 8.

NEGLIGENCE. See Evidence, 12, 16, 18; Telegraph Companies, 1-12; Railroads, 9-11, 42-44; Laws, 1; Damages; Master and Servant, 7-0.

# NEW TRIAL.

- 1. Terms, new trial may be granted on. Gordon vs. Mitchell, 11.
- Newly discovered evidence as to previously known but not used fact, no ground. Huntington vs. Bonds, 23. (Witness to prove fact absent and no continuance asked). Parker vs. Martin et al., 453.
- 3. Verdict necessary, grant of new trial error. Ferrell et al. vs. Hurst et al., 132.
- 4. Charge, word in taken alone objectionable, but correct with context, no new trial. Heath vs. State, 287.
- 5. Extraordinary motion not allowed for matters proper to defence. Cauthen vs. Barnesville Svings Bank, 287.
- 6. Attorney employed by landlord to represent tenant, not make motion illegal. Whitley vs. Alston et al., 200.
- 7. Evidence admitted "for what it is worth," bad practice, but not necessitate new trial. Marion vs. State, 290.
- 8. Record requires reversal in these cases. Norfleet & Jordan vs. Clary, 297; Chapman vs. Hand et al., 297.
- 9. First grant of new trial affirmed. Cobb vs. Peeples, 298; Henderson vs. Sledge; Hughes vs. Maples; Hawk vs. Leverette et al; Thomas vs. Ga. R. R., 838.
- Newly discovered evidence, impeaching or cumulative, not cause new trial. Thorpe vs. Wray, 359.
- 11. Release of one of three sued jointly, judge cannot require new trial unless made. Irwin vs. Riley, 605.
- 12. Supreme court can do so. Ibid.
- 13. Newly discovered evidence, diligence must be shown. Han-

- vey vs. State, 612; Childers vs. State, 837; Leverette vs. Cook, adm'r, 838.
- Newly discovered witnesses, residence, character and credibility must be shown. Hanvey vs. State, 612.
- Affidavit not signed but followed by another which verifies, considered. Moon vs. State, 687.
- 16. Brief of evidence, time allowed to file, must be filed within. Usry vs. Phillips, 815.
- 17. Brief not agreed on or approved filed, insufficient. Ibid.
- 18. Sickness of party, failing to inform court of and move for continuance, no new trial. Lumpkin vs. Respess, for use, 822.

See Verdict; Charge of Court, 11; Administrators and Executors, 4; Practice in Superior Court, 17.

#### NON-SUIT.

- 1. Non-suit right, reason given wrong, judgment affirmed. Tompkins vs. Phipps, 155.
- 2. Dismissal of levy being proper, non-suit granted having same effect, affirmed. *Ibid*.
- 3. Equity, no non-suit in; but case dismissed for want of proof. Sandeford vs. Lewis et al., 482.
- 4. Equity, dismissal right, calling it non-suit not require reversal. *Ibid.*
- Novation of contract sued on shown, non-suit proper. Tucker vs. Ball, adm'x, 814.

#### NOTICE.

- 1. Possession of land gives notice of rights. Finch et al. vs. Beal, 594.
- 2. Purchaser takes subject to equities of holder. Ibid.
- 3. Recitals in deed to vendor, vendee affected by. Simmons vs. Goodrich, trustee, 750.
- 4. Contract not of record, purchaser not affected by. Ibid.
- 5. Suit appearing on records, is notice to third parties. Gunn vs. McMichael, adm'x, 826.

See Set-off, 2; Partnership, 9; Contracts, 27; Vendor and Purchaser, 4-6; Homestead, 25; Administrators and Executors, 23.

#### NUISANCE.

- 1. Stable, private, in city not necessarily nuisance, though near neighbor's line. Rounsaville et al., vs. Kohlheim, 668.
- 2. Stable must be so constructed as not to produce annoyance.

NULLITIES. See Judgment, 5, 15, 20, 22, 26, 35; Homestead, 22.

#### OFFICERS.

- 1. Office and public officer defined. Polk et el., commissioners, vs. James, ord'y, et al., 128.
- 2. Mandamus against for failure to perform duties. Ibid.

See Constable, 1; Costs, 5; Douglas County.

ONUS PROBANDI. See Evidence, 4; Ejectment. 4; Jurors, 10, 14; Guardian and Ward, 4; Partnership, 6; Presumption, 7; Trusts and Trustees, 1.

#### ORDINARY.

- Damages against county, claim for, presented in twelve months and refused, may be sued in superior court. County of Cobb vs. Adams, 51.
- Exclusive jurisdiction of damage cases against county, court of ordinary has not, after refusal to approve claim. *Ibid.*
- Administrator's sale, leave granted, not enjoined by heir for reasons proper for caveat. Bailey vs. Ross, adm'r, et al., 735.
- Administrator's sale, judgment granting leave, not collaterally attacked. *Ibid*.
   See Removal of Causes, 6.

OUSTER. See Landlord and Tenant, 5.

# PARENT AND CHILD.

- Custody of child, agreement by father for another to have, and latter cares for child before and after death of parent, if a proper person, he takes preference of next of kin. Cleghorn vs. Janes, 87.
- 2. Custody of child, discretion of ordinary on habeas corpus. Smith vs. Bragg, 650.
- Custody of minor wife by parent or husband, in discretion of court. Gibbs vs Brown, 803.
- 4. Marriage of female minor over fourteen valid without consent of parents. *Ibid*.

#### PARTIES.

- 1. Bill to recover stock fraudulently sold, seller properly made a party. Blaisdell et al. vs. Bohr et al., 56.
- 2. Some of purchasers may be sued; dismissed as to others. *Ibid*.
- All persons interested in event of bill properly made parties. *Ibid*.
- 4. Sheriff's suit for failure to comply with bid at sale under two mortgages, both mortgagees made usees. Sharman, sheriff, for use, vs. Walker, 148.

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- 5. Executor of guardian made party, on his death pending suit for board bill of wards. Lewis, ex'r, vs. Allen, adm'r, 308.
- 6. Objection should be made before judgment on sci. fa. Ibid.
- Administrator both of decedent and an heir may file bill for settlement and fix status of heirs, including decedent. Groves, ord'y, for use, vs. Williams, adm'r, et al., 598.
- 8. Decree not void because he was both plaintiff and a defendant, *Ibid*.
- Trespass for levying on homestead, wife or family may bring without joining husband or father. Mc Williams et al. vs. Anderson, 772.
- Amendment, debtor not added individually or as next friend by. Ibid.

See Quo Warranto, 1,3; Service, 3; Claim, 3; Practice in Supreme Court, 16, 34; Pilots, 1.

### PARTNERSHIP.

- Judgment against firm, execution against firm and individuals, variance is fatal. Clayton & Webb vs. May, 27.
- 2. Assets belong to partners, firm not an entity. Blanchard, Williams & Co. vs. Paschal, 32. (Compare 15 below.)
- 3. Homestead, set apart out of firm assets. Ibid.
- Levy before severance of firm assets not prevent homestead of partner. Ibid.
- Capital all withdrawn not alone prevent homestead; fraud necessary. *Ibid*.
- 6. Large assets held by firm shortly before application for homestead by one partner, onus on him to account for. *Ibid*.
- 7. New contract, or renewal, partner has no power to make after dissolution. First Nat. B'k, etc., vs. Ells, 102.
- 8. Power to settle business does not include new indorsement. *Ibid*.
- Creditor taking new draft of one partner, with notice of dissolution, not recover against other. Ibid.
- 10. Several recovery allowable under suit against two as partners; aliter at common law. Francis vs. Dickel & Co., 255.
- Several liability, evidence of under joint suit, would necessitate amendment. *Ibid*.
- 12. Husband and wife, can they be partners? Quære. Ibid.
- Possessory warrant lies, where one partner entitled to control property and other takes it by violence or fraud. Ivey et al. vs. Hammock, 428.
- Joint account, money received to be invested in real estate on, parties partners. Hill, adm'r, vs. Sheibley, 556,
- Debt of firm is debt of each partner. Weatherly vs. Hardman, 592. (See 2 above.)
- Bankruptcy, promise of partner after, to pay firm debt made before, is good. *Ibid*.



- 17. Sayings of one party inadmissible to show partnership as to other. Flournoy & Epping vs. Williams, 707.
- 18. Agent employing assistant, latter not partner as to principal. Flournoy & Epping vs. Williams, 707.
- 19. Joint suit, partnership contested, but if existed three in it, verdict against two illegal. Bosworth et al. vs. West, 825.

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#### PAWNS.

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- 7. Dismiss action and defeat set-off, plaintiff cannot. Ibid.
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- Hidden meaning, telegram in common commercial terms, has not, so as to limit damages. Ibid.
- 10. Value of message, what sufficient on its face to show. Ibid.
- "Cotton futures," loss of agent from error in telegram concerning, damages recoverable. *Ibid*.
- 12. Principal paying loss, may recover of company. Ibid.

## TITLE.

- 1. Slave could not acquire in 1855. Woods vs. Pearce, 160.
- Descent allowed to free persons of color by act of 1819 contemplated free descendants. Ibid.
- Emancipation, ancestor dying before, title did not vest in siave heir afterwards. Ibid.
- 4. Parol purchase of land not good. Blance vs. Goodnow, 264.
- 5. Fraud used by taking advantage of mental weakness, conveyance set aside. Wood et al. vs. Isom et al., 417.
- 6. Compromise effected and title obtained bona fide, invoking scriptures in aid of same, not invalidate. Ibid.
- 7. Homestead, individual deed of head of family to, conveys no title. Hall vs. Matthews et al., 490.
- 8. Purchaser bona fide under husband protected, though wife's money invested in property. Gorman et al. vs. Wood, 524.
- 9. Notice of equity, purchaser with, takes subject to. Finch et al. vs. Beal, 594.
- Subrogation to place of obligor in bond for titles in this case, and purchaser bound by bond. *Ibid*.
- 11. Levy, title remaining in vendor giving bond for title, is subject to. Hardee vs. McMichael, adm'x, 678.



- 12. Subrogated to vendor's rights, purchaser under ft. fa. is. Ibid.
- 13. Sheriff's deed not alone show title; title or possession necessary in defendant. Beck vs. Bower et al., adm'rs, 738. (See Parker vs. Martin et al., 453.)
- 14. Notice of recitals in deed to vendor, vendee affected with. Simmons vs. Goodrich, trustee, 750.
- 15. Notice, vendee not affected by contract not of record. Ibid.
- 16. Deed and mortgage distinguished. Culley vs. Blooming dale, Rhine & Co., 756.
- 17. Color of title, sheriff's deed alone is. Hammond & Hinson vs. Crosby & Co., 767. (Compare No. 13, above.)
- 18. Quit claim good as color of title. Ibid.
- Presumption of good faith of holder not destroyed by quit claim. Ibid.
- 20. Fraud avoids deed. Carter vs. Pinkard, 817.
- 21. Notice of fraud, purchaser with, gets no title. Ibid.
- 22. Usurious deed void as title, enforceable as equitable mortgage.

  Bullard vs. Long et ux., 821.
- 23. Line between adjoining tots established by seven years' acquiescence. Cleveland vs. Treadwell, 835.

See Deed, 1, 4, 6, 8, 9, 15; Estates; Landlord and Tenant, 9; Ejectment, 4; Dedication, 1; Interest and Usury, 1; Notice, 1; Year's Support, 1; Equity. 12.

TORT. See Railroads, 1; Damages, 15.

#### TREASURER.

- 1. Pays money only on warrant countersigned by comptroller. Gurnee, 3r., & Co. vs. Speer, treasurer, 711.
- 2. Bonds, payment of, not enforced by mandamus, no warrant being issued or countersigned. Ibid.
- 3. Bonds, constitution of 1877 did not make specific appropriation to pay. *Ibid*.

TRESPASS. See Fence, 3-4; False Imprisonment, 2; Homestead, 24; Criminal Law, 32; Damages, 15.

#### TROVER.

1. Part of property properly disposed of, not prevent verdict for balance. Huntington vs. Bonds, 23.

See Contracts, I.

## TRUSTS AND TRUSTEES.

 Confederate money, received when prudent men took it, and failing in trustee's hands, onus on him to show. Venable, g'd'n, vs. Cody, 171.

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- 2. Witness, trustee incompetent to deny debts after taking judgment to sell trust and pay. Ansley, trustee, et al. vs. Pace & Co. et al., 403.
- 3. Sale made under order at chambers, although there may be remainder interest. *Ibid.* (See 12 below).
- 4. Birth of child who might have interest in trust, not invalidate previous order to sell. *Ibid*.
- Sale, power granted by chancellor not exercised, trustee required to make, on proper case. *Ibid*.
- 6. Sell, chancellor may grant leave to trustee of minors at chambers. Overby vs. Hart, 493.
- Deed showing trust, signing of individual name immaterial. *Ibid*.
- 8. Character of trust proved to show whether necessary to borrow therefor, borrowing being issue. White vs. Fulton, 511.
- Homestead in nature of, and similar pleadings necessary to subject. Wilson vs. Rogers et al., 549.
- 10. Sale, beneficiaries cannot both hold proceeds of, and recover property. Bonner et al. vs. Holland et al., 718.
- 11. Proceeds pursued and decree taken for land, presumption that it was received, and onus to show contrary. Ibid.
- 12. Sale, chancellor may order at chambers. Iverson et al. vs. Saulsbury, Respess & Co., 790
- 13. Mortgage, chancellor cannot grant power to, at chambers. (Jackson, C. J., dissenting.) *Ibid*,
- 14. Mortgage, semble that court might grant power to, in term time.

  Ibid.

See Equity, 13, 23.

# UNITED STATES COURTS. See Removal of Causes.

#### VENDOR AND PURCHASER.

- 1. Vendor's lien, none in Georgia. Echols vs. Head & Co., 152.
- 2. Levy, title remaining in vendor giving bond for title, is subject. Hardee vs. McMichael, adm'x, 678,
- 3. Subrogated to rights of vendor, purchaser under fi. fa. is. Ibid.
- Bona fide purchaser, to be protected, must be without notice and have paid purchase money. Carter vs. Pinckard, 817.
- 5. Protection as to part paid without notice, must plead. Ibid.
- 6. Notice of fraud in deed, purchaser with, gets no title. Ibid.

  See Contracts, 27,; Husband and Wife, 8.

VENUE. See Criminal Law, 37, 38; Railroads, 20.

#### VERDICT.

1. Lot or chance resorted to, illegal. Obear, ex'r, et al. vs. Gray. 182.



- 2. Damages not excessive. Geo. So. R. R. vs. Bigelow, 219; Atlanta, etc., Rwy. vs. Tanner, 384.
- 3. Bias or prejudice, verdict for vindictive damages based on, set aside. Augusta, etc., R. R. vs. Dorsey, 228.
- 4. Separate lots levied on and claimed, verdict subjecting some, others impliedly not subject. Moses, trustee, vs. Eagle & Phenix Mfg. Co., 241.
- 5. Intention of verdict, judgment amended to declare. Ibid.
- 6. Construed by court from pleadings and evidence. Harvey vs. Head, 247.
- 7. Several recovery under suit against two as partners. Francis vs. Dickel & Co., 255.
- 8. Contrary to evidence. Johnson vs. Wilson & Co., 290; Byrd vs. State, 661.
- 9. Sustained by evidence. Thomas vs. Thomas; Coker vs. State; Hanie vs. State, 298; Tyson vs. State, 835; Garlington vs. State; Coleman vs. Jones; Matthews vs. Bivins, ex'x, 837; Dougherty vs. Reed, 838.
- Improvements "of a character needed," special finding construed to mean merely necessary repairs. Walker et al. vs. Grady, 330.
- 11. Principal and interest separately found. Lewis, ex'r, vs. Allen, adm'r, 398.
- Presumption that no interest found, sum being less than principal, under equitable plea.
- 13. Inferences from facts, jury may make. Beall vs. State, 820.
- 14. Ejectment, verdict for plaintiff means for premises, and not void. Johnson vs. Jones et al., 825.

See Criminal Law, 12.

#### WAIVER.

- 1. Rule nisi to foreclose mortgage may be waived. Stiles, adm'r, vs. Elliott, ex'r, 83.
- 2. Refusal to pay policy waives proof of loss. Merchants', etc. Ins. Co. vs. Vining & Bro., for use, 197.
- 3. Refusal pending garnishment, waives during that time. Ibid.
- 4. Appearance and pleading in case to establish lost note not waive want of process in suit on. Reese et al., for use, vs. Kirby, 825.

See Homestead, 5; Railroads, 31.

WAREHOUSEMAN. See Damages, 5-6.

WARRANTY. See Contracts, 34.

## WILLS.

 Legacy, courts not inclined to construe as specific. Morton vs. Murrell et. al., 141.

- 2. Intention is cardinal rule of construction. Ibid.
- Judgment admitting to record binding till reversed. Langston, ex'r, vs. Marks; 435.
- 4. Nullity, judgment being on its face. attacked as such. Ibid.
- 5. Foreign testator, as to realty here, will construed by laws of this state. *Mechanics'*, etc., B'k et al. vs. Harrison, ex'r, et al., 463.
- 6. Costs, how awarded when will propounded and rejected. Francis et al. vs. Holbrook, 829.

See Legacy; Estates, 1, 3.

#### WITNESS.

- Dead party: sayings of one contestant for child of deceased parent introduced, to show non-existence of contract for child, he may rebut and explain same, though parent dead. Cleghorn vs. Janes, 87. (See 10, below).
- 2. Credibility of witnesses is for jury. Ibid.
- 3. Expert engineer may state duties. Aug., etc., R. R. vs. Dorsey, 228.
- 4. Conductor likewise. Ibid.
- Expert testifying without reasons, other witness may with reasons. Ibid.
- Employé suing for damage from negligence of co-employé, latter competent to prove he was not at fault. Ibid.
- 7. Refresh memory, witness may, from memorandum, and testify. Hinton vs. State, 322.
- 8. Privilege of witness claimed against answering if she lived in house of prostitution. Thorpe vs. Wray, 359.
- 9. Trustee having obtained judgment to sell to pay debts, incompetent to disprove same. Ansley, trustee, et al. vs. Pace & Co. et al., 402.
- Dead, other party being, witness may still rebut testimony of living witnesses. Wood et al. vs. Isom, 417. (See 1, above.)
- 11. Impeach a witness, general statement that evidence was introduced to, not cause new trial. Sims vs. State, 486.
- 12. Impeaching witness, that one had known character year before, did not know it now, or that it was changed, but believed there had been a reformation, admissible. *Ibid*.
- 13. Rule, witnesses not put under, allowed to testify in rebuttalif ends of justice require. Hanvey vs. State, 612.
- 14. Discharge of witnesses before statement is defendant's own fault. (Here he introduced none). *Ibid*.
- 15. Deceased witness, testimony at committing trial proved by parol. Robinson vs. State, 833.

See Evidence, 12, 13, 15, 43.

## YEAR'S SUPPORT.

- Return, record and lapse of six months, vests title in family. No formal judgment necessary, except as to money. Coman vs. Corbett et al., 66.
- 2. Record before six months not invalidate; becomes good after that time. *Ibid*.
- Sale of property set apart, and application of proceeds to support, valid. Tabb vs. Collier, 641.
- 4. Presumption in favor of judgment setting apart; not collaterally attacked. *Ibid*.
- 5. Mortgage, year's support prevails against. Cully vs. Bloomingdale, Rhine & Co., 756.



